# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 923.

HERNDON-CARTER COMPANY, APPELLANT,

vs.

JAMES N. NORRIS, SON & COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

FILED JANUARY 8, 1912.

(22,920)

(22,999)

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INDEX.



JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 17, 1912.

# TRANSCRIPT OF RECORD.

Proceedings of the Circuit Court of the United States for the Western District of Kentucky, at a regular term begun and held at the Federal Court Hall in the City of Louisville on Monday, March 13, A. D. 1911.

Present: Honorable Walter Evans, sitting as Circuit Judge.

The Herndon-Carter Company,
Complainant,
vs.
James N. Norris, Son & Company,
Defendant.

Be it remembered, That heretofore, to-wit, on March 9th, 1911, came the complainant by Bruce & Bullitt, its counsel, and filed in the Clerk's office of our said court its Bill of Complaint against the above named defendant.

The Bill of Complaint above referred to is as follows:

United States Circuit Court, Western District of Kentucky, at Louisville.

The Herndon-Carter Company,
Complainant,
vs.
James N. Norris, Son & Company,
Defendant.

Bill in Equity.

To the Judges of the United States Circuit Court for the Western District of Kentucky, in equity sitting:

The Herndon-Carter Company, a corporation created and organized under and by the laws of the State of Kentucky, and a citizen thereof, and a resident of the Western District of said State, brings this, its bill, against the James N. Norris, Son & Company, a corporation created and organized under and by the laws of the State of New York, and a citizen thereof, and doing business both in New York and in Kentucky. And thereupon this complainant avers and says:

Complainant, The Herndon-Carter Company, is a corporation created and organized under and by the laws of the State of Kentucky and is a citizen thereof, and a resident of the Western District of said State.

Defendant, James N. Norris, Son & Company, is a corporation created and organized under and by the laws

of the State of New York and is a citizen thereof, doing business both in New York and in Kentucky.

In this suit there is a controversy between citizens of different States, and the matter in dispute herein, exclusive of interest and costs, exceeds the sum of $3,000.00.

During all the time hereinafter mentioned, complainant, as a corporation, had power to contract and be contracted with, sue and be sued, and was engaged in the business of buying and selling live poultry. And during all said time defendant, as a corporation, had the power to contract and be contracted with, to sue and be sued, and was engaged in selling live poultry as a commission merchant, charging and receiving on its sales an agreed commission. On or prior to December 11, 1906, complainant made an arrangement and an agreement with defendant by which it was agreed between them that complainant, who was doing business in Kentucky, should ship from Kentucky to defendant in New York live poultry which defendant would sell for complainant in the New York market at the best price it could get for same, and that defendant would faithfully account for and pay to complainant the proceeds of all such sales, after first charging and deducting from such proceeds an amount equal to 5 per cent of such sales as compensation to defendant, and also after charging to complainant and deducting any proper expenses that defendant might pay as incident to said business, such as expenses for freight, for handling, and for coops for said poultry. Under this arrangement, and with this understanding and agreement, complainant at divers times, beginning December 11, 1906, and covering a period of nearly three years, to-wit, about thirty-four months, made to defendant a great many shipments of live poultry, being several shipments during each month embraced in said period, which defendant undertook to sell for complainant under the arrangement aforesaid, and which it did sell. And defendant reported to complainant that which it stated to be the true price at which it had sold the poultry embraced in each of said shipments; and upon each of which defendant charged complainant a commission of 5 per cent upon the amount thereof, which commission defendant retained; after deducting which, and after deducting what defendant said were the charges for the expense of caring for and handling said poultry, it, the said defendant, accounted for and paid over to complainant the remainder of the proceeds of said sales; which sales, according to the reports of defendant to complainant, aggregated in amount over $200,000.00; and upon which the commission which de-

fendant charged to complainant and retained, amounted to $9,995.19.

Complainant says, however, that the said pretended sales reported to complainant by defendant as aforesaid, for the proceeds of which defendant accounted to complainant, after making the deductions aforesaid, were not bona fide; and that the said poultry shipped by complainant to defendant for sale was in fact sold for greater amounts than those reported. The facts and circumstances under which these sales were made are as follows, to-wit:

During all the time hereinbefore mentioned the defendant herein was a member of, and a party to, an unlawful combination between certain persons (other than complainant) engaged in buying and selling live poultry; that said combination was composed of several persons (natural or artificial), to-wit: about eight, of whom defendant herein was one, all of whom were commission merchants engaged in selling live poultry upon commission, and who will hereinafter, for brevity, be called receivers, and several other persons (natural or artificial), to-wit: about five, who were wholesale buyers of live poultry, and who will hereinafter, for brevity, be called jobbers. During all the times herein mentioned there was an agreement between said receivers and jobbers by which all the live poultry received by said receivers for sale as commission merchants was pretended to be sold to said jobbers, who were in said combination, at certain prices, which were fixed each week by some kind of an arrangement between said receivers and jobbers who were in said combination; and these were the prices which said receivers or commission merchants reported to their several principals from whom they had received poultry for sale, including this complainant, as the prices at which their poultry had been sold. And the pretended prices arrived at in this way are the prices which defendant herein reported to complainant as the prices at which its poultry had been sold during the period aforesaid. And the said agreement between the said receivers and jobbers further provided that the said jobbers having gone through the form, as aforesaid, of buying said poultry from said receivers, at pretended prices fixed as aforesaid, should then sell said poultry; and that the difference between the prices at which said jobbers had pretended to buy said poultry from said receivers and the prices at which said jobbers should sell said poultry, should be considered as profit; and that the entire amount of all the commissions received by the said receivers, as aforesaid,

in accounting to their principals for sales of poultry, should be combined with all of the profits realized by the said jobbers on their sales of said poultry in the manner aforesaid, thus forming a pool of the aforesaid commissions and profits; that this pool, or combination of commissions and profits, should then be divided into two equal parts; that one of these equal parts should then be divided equally among the said receivers who were in said combination, and the other equal part should be divided equally among the said jobbers who were in said combination. In this way each of said receivers and jobbers had an interest in each of the transactions aforesaid and in the compensation and profits realized therefrom. And in this way the defendant herein, while pretending to sell poultry for complainant, was interested in the profits which the jobber pretending to buy said poultry through defendant from complainant was to make, and did make, upon the subsequent sale of said poultry by said jobber. And the jobber buying complainant's poultry through defendant was interested in the commission which defendant charged to and collected from complainant.

The aforesaid arrangement or combination between said receivers, including defendant, and the said jobbers, was wholly unknown to complainant throughout the entire period covered by the transactions hereinbefore described, and was only lately discovered by complainant long after said transactions had all been completed. Complainant believed during all said period that defendant was in good faith selling complainant's poultry for the best prices defendant could obtain therefor, and that the prices reported to complainant by defendant were the prices received by defendant at bona fide sales of said poultry and it knew nothing of the arrangement hereinbefore described between defendant and other receivers and jobbers, under which defendant had an interest in the subsequent sales of complainant's poultry. Complainant says said combination and practice were unlawful and were a fraud upon its rights; that said first sales, to-wit, the pretended sales of complainant's poultry through defendant, as a commission merchant, to said jobbers were not the real bona fide sales of complainant's poultry; but that the second sales hereinbefore described, to-wit, the sales of said poultry by said jobbers, were the real, true sales of complainant's property; and the prices received for said poultry upon said second sales were the real prices received for complainant's property, and for which defendant should have accounted to complainant.

Complainant believes and charges that its poultry covered by the aforesaid various shipments to defendant was in fact sold for prices which aggregated more than $225,000.00, which is a sum largely in excess of the aggregate of the sums which defendant reported to complainant as the sums for which complainant's property had been sold by defendant. And defendant should now be required to account to complainant for the true amounts for which complainant's property was sold as aforesaid, and to pay over to complainant such sum as it shall be found herein that defendant properly owes to complainant on account of said transactions.

And complainant further says that the commissions aggregating as aforesaid, the sum of $9,995.19 were allowed and paid to defendant in consideration, and solely in consideration, of the agreement on its part that it would faithfully represent and act for complainant as a commission merchant in making said sales, and that it would faithfully and honestly report to complainant the true amounts at which said property had been sold and account to complainant therefor; whereas, in fact defendant did not faithfully represent complainant in said matters, and did not faithfully report and account to complainant for the sales made by it of said property; and defendant never earned or acquired the right to any commission or compensation from complainant, and was not entitled to retain any compensation for its actions in the matters aforesaid, and the amounts which it thus retained from complainant should be paid by defendant to complainant, with interest on each item thereof, from the date of its unlawful charge and retention.

The period covered by the transactions aforesaid, and during which complainant was shipping the said live poultry to defendant, and defendant was selling the same and pretending to report and account to complainant for the true amounts of said sales, was, as aforesaid, nearly three years in duration; during which time complainant made several shipments each month to defendant, which shipments aggregated more than 120 in number. Furthermore, in each shipment there were included several classes of live poultry, such as chickens, ducks, geese, turkeys, guineas, etc., each of which classes of poultry sold at different prices, so that the total number of sales made by defendant for complainant, including the sales of the various shipments, was more than 500 in number. Furthermore, the defendant, during all of said period, made various charges against complainant upon each of said shipments, such as charges for commission, for freight, for cartage,

for handling, and for other expenses; and thus it is that the account between complainant and defendant, growing out of said transactions, is a mutual account embracing both debits and credits in case of each of said many shipments. The said transactions are so many in number, and the respective items of debit and credit as between complainant and defendant, its said agent, are so numerous that it will be impossible for a jury to reach a conclusion and make a verdict that would be true and just both to complainant and to defendant. And complainant has no adequate remedy at law, and is entitled to the aid of a court of equity in requiring its unfaithful agent, the defendant herein, to make a true disclosure of the prices at which complainant's property, committed to defendant for sale, was in fact sold, and to make a just and true accounting to complainant of said transactions, many of the details of which are solely within the knowledge of defendant and its unlawful confederates. Complainant has demanded of defendant information as to said sales of its poultry, and has demanded to know to whom its poultry was in fact sold, in order that it might ascertain the truth as to said transactions, but defendant wholly ignored complainant's demand and has failed and refused to give it any information in response thereto.

To the end that complainant may obtain the relief to which it is justly entitled in the premises, it now prays the Court to grant it due process by subpoena, directed to the said James N. Norris, Son & Company, requiring and commanding it to appear herein and answer (but not under oath, the same being hereby expressly waived), the several allegations in this bill contained. And complainant further prays that defendant be required to disclose (but not under oath, which is waived) the amounts at which complainant's poultry was in fact sold, and that defendant be required to render a true and correct account of all its transactions involved in handling and selling the poultry shipped to it by complainant for sale, including the true amounts for which said property was sold and any just and proper expenses chargeable against the same, and that defendant be charged with interest on all such amounts as it improperly received or retained on account of said several sales, from the date of said several sales until paid herein, and that defendant be not allowed to charge against complainant any commissions in view of its unfaithful conduct herein described; and, finally, that defendant be required to pay over to complainant whatever balance may finally be found herein to be justly due from the defendant to complainant upon the accounting aforesaid And com-

plainant further prays for any other relief to which it may appear to be entitled, and as may be just and equitable.

Bruce & Bullitt,
Attorneys for Complainant.

Upon which Bill of Complaint there issued the following subpoena in Chancery:

The President of the United States of America to James N. Norris, Son & Company, Greeting:

You are hereby commanded to appear before our Circuit Court of the United States of America, for the Western District of Kentucky, at the Federal Court Hall, in the City of Louisville, on the first Monday in April next, to answer a Bill in Equity exhibited against it in our said Court, by The Herndon-Carter Company which you shall in no wise omit, under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of our said Circuit Court hereto affixed, at the Clerk's office of said Court, in Louisville, this 9th day of March, A. D. 1911, and in the 135th year of our Independence.

(L. S.) Attest: A. G. Ronald, C. C. C., W. K. D.
By Henry F. Cassin, his Deputy.

Memorandum—The defendant is to enter its appearance in the suit in the Clerk's office, on or before the 3rd day of April next, the day at which the writ is returnable, otherwise the bill may be taken pro confesso.

A. G. Ronald, Clerk,
By Henry F. Cassin, his Deputy.

Upon which the Marshal made the following return:

"Received the within Subpoena in Chancery and one copy at Louisville, Ky., on the 9th day of March, 1911, and executed same at Louisville, Ky., on the 10th day of March, 1911, on the within named James N. Norris, Son & Company by delivering a true copy hereof to W. J. Adams, Manager and chief agent and the highest officer of said Company found in my district.

This 10th day of March, 1911.

G. W. Long, U. S. Marshal,
By Lewis Ryans, Dpty. U. S. M."

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And on April 3rd, 1911, the following proceedings were had:

The Herndon-Carter Company, Complainant,
vs.
James N. Norris, Son & Company, Defendant.
No. 7277.

Now comes the defendant by James R. Duffin and Burton Vance, its counsel, for this purpose only, and enters its special and limited appearance herein for the single purpose of objecting and pleading to the jurisdiction of the Court over it, and filed its objection and plea to the jurisdiction herein.

The special appearance, objection and plea to the jurisdiction is as follows:

Circuit Court of the United States for the Western District of Kentucky, at Louisville.

The Herndon-Carter Company,
Plaintiff,

vs.

Jas. N. Norris, Son & Company,
Defendant.

Special Appearance, Objection and Plea to the Jurisdiction.

Now comes the defendant by James R. Duffin and Burton Vance, its counsel, for this purpose only, and enters special and limited appearance herein for the single purpose of objecting and pleading to the jurisdiction of the Court over it, and for no other purpose, and under its said special and limited appearance it states that it is a corporation organized and existing under and by virtue of the laws of the State of New York; that its chief place of business is the City of New York in the State of New York, of which city and State it and all of its officers and stockholders are residents and inhabitants; that it has not now, nor has it since December, 1904, had any place of business in the State of Kentucky; that it is not now conducting, nor has it since December, 1904, conducted any business in the State of Kentucky; that it has not now, nor has it since December, 1904, had an agent in the State of Kentucky; that W. J. Adams, upon whom the Marshal of this Court served the subpoena herein, was not at the time of said service, to-wit, on the 10th day of March, 1911, is not now, and never has been since December, 1904, a manager or an officer or an agent or a representative or an employe of this defendant, or in any way connected with it; that W. J. Adams was not on said 10th day of March, 1911, is not now, and has never been since December, 1904, either manager or chief agent or highest, or any, officer of defendant in this district or elsewhere; and that the return of the Marshal upon said subpoena herein is untrue in fact and insufficient in law.

Defendant says that for a little over two years prior to the first day of January, 1905, the said W. J. Adams was employed by it and acted as its Agent in Kentucky in the

purchase and shipment to it of poultry and produce, but that at the end of the year 1904 he severed his connection with defendant and ceased to be its agent for any purpose whatever, and on the first day of January, 1905, the said W. J. Adams, J. N. Norris and William H. Norris formed a partnership to which the said W. J. Adams contributed one-half of the capital and said J. N. Norris and W. H. Norris each one-fourth, and that since said first day of January, 1905, the said partnership has conducted the business of buyers and shippers of poultry, butter and eggs in Louisville and other parts of Kentucky, and that this defendant has not now, and never has had, any interest in said firm and said firm and none of its partners has ever been the agent of the defendant for any purpose whatsoever in the State of Kentucky; and that the only business transactions it has had with said partnership since the first day of January, 1905, consisted in business relations with said firm under which the said firm consigned to defendant on commission poultry and eggs which it sold for it on the Eastern market and charged it a commission of 5 per cent in exactly the same way that it did the plaintiff in this action.

The defendant says that it has the legal right and privilege, which it now and shall ever claim, to be sued in the district whereof it is a resident and inhabitant, which is, as aforesaid, the Southern District of New York.

By reason of the premises, this defendant says this Court acquired no jurisdiction over it by virtue of the service of said subpoena upon the said W. J. Adams, as appears by the return of the Marshal on said subpoena.

Wherefore, it objects to this Court exercising jurisdiction over it in this action, and moves that the said return upon said subpoena be quashed and held for naught.

James R. Duffin,
Burton Vance,
Attys. for Deft.

Burton Vance says he is one of the counsel for the defendant, employed for the purpose of presenting its objection to the jurisdiction of the Court in this action, and that said defendant is absent from the State of Kentucky, and that the statements of the foregoing pleading are true as he verily believes.

Burton Vance.

Subscribed and sworn to by Burton Vance, before me, this 31st day of March, 1911.

(L. S.) Virgil O. Duffin,
Notary Public, Jefferson County, Ky.

My Commission expires Feb. 24, 1914.

James N. Norris.

And on April 19th, A. D. 1911, the following proceedings were had:

The Herndon-Carter Company,
vs.
James N. Norris, Son & Company,
Defendant.
} No. 7277.

Now comes the defendant under its special and limited appearance herein, and in support of its objection and plea to the jurisdiction of the Court over it herein, files the affidavits of James N. Norris, William H. Norris and W. J. Adams.

The affidavits of James N. Norris and William H. Norris, above referred to, are as follows:

In the Circuit Court of the United States for the Western District of Kentucky, at Louisville.

The Herndon-Carter Company,
Complainant,
vs.
James N. Norris, Son & Company,
Defendant.
} Affidavit.

James N. Norris, being first duly sworn, deposes and says:

That he is President of James N. Norris, Son & Company, a corporation organized and existing under and by virtue of the laws of the State of New York, engaged in the mercantile business at the City of New York in the State of New York.

Affiant further states that the defendant, James N. Norris, Son & Company, has not been engaged in business since the 1st day of January, 1905, in the State of Kentucky, and ever since the first day of January, 1905, said defendant has had no place of business and has transacted no business within the State of Kentucky, and that during said time, to-wit, ever since the first day of January, 1905, the defendant has had no one in the State of Kentucky authorized to transact any business for or on behalf of the defendant, James N. Norris, Son & Company.

Affiant further states that commencing the first day of January, 1905, this affiant, together with W. J. Adams, of Louisville, and William H. Norris, of New York City, in the State of New York, entered into a co-partnership for the purpose of buying and selling poultry, butter and eggs in the State of Kentucky; that W. J. Adams contributed $1500.00; that this affiant contributed $750.00, and that William H. Norris contributed $750.00 to the partnership fund; that the said W. J. Adams owned a one-half interest thereof and was entitled to one-half of

the profits of said business; and that this affiant and William H. Norris owned one-fourth interest in said partnership, and were each entitled to one-fourth of the profits of said business; and that said profits of said co-partnership had been divided annually ever since said time; that ever since January 1, 1905, said partnership has conducted said business in the City of Louisville under the firm name of James N. Norris, Son & Company, and that said co-partnership or firm now has a branch office of business at several other points in the State of Kentucky and has conducted the business under said partnership ever since the first day of January, 1905; that during the existence of said co-partnership it has consigned a large part of its purchases to the defendant, James N. Norris, Son & Company, a corporation of New York, and has paid to it the regular commission of five per cent on poultry sold for said firm by the defendant and has paid to said corporation the regular commission of one-half of one cent per dozen for eggs consigned to and sold by said corporation for said firm, as aforesaid.

Affiant further states that ever since the first day of January, 1905, said W. J. Adams has not been authorized in any way by the James N. Norris, Son & Company, the defendant in this case, and is not a stockholder in said corporation and is not an officer or agent thereof, and has not been a stockholder, officer or agent thereof since the first day of January, 1905; that the said W. J. Adams was not authorized by said defendant corporation to accept service of the subpoena or complaint filed herein and has no connection whatever with the defendant corporation and no authority to act for or on its behalf.

James N. Norris.

Subscribed in my presence and sworn to before me, this 5th day of April, 1911.

(Seal) C. A. Campbell,
Notary Public.

My commission expires June 11, 1914.

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In the Circuit Court of the United States for the Western District of Kentucky, at Louisville.

The Herndon-Carter Company,
Complainant,
vs.
James N. Norris, Son & Company,
Defendant.

Affidavit.

William H. Norris.

William H. Norris, being first duly sworn, deposes and says:

That he is Vice-President and Manager of James N. Norris, Son & Company, a corporation organized and existing under and by virtue of the laws of the State of New York, engaged in the mercantile business at the City of New York in the State of New York.

Affiant further states that the defendant, James N. Norris, Son & Company, has not been engaged in business since the 1st day of January, 1905, in the State of Kentucky, and ever since the first day of January, 1905, said defendant has had no place of business and has transacted no business within the State of Kentucky, and that during said time, to-wit, ever since the first day of January, 1905, the defendant has had no one in the State of Kentucky authorized to transact any business for, or on behalf of the defendant, James N. Norris, Son & Company.

Affiant further states that commencing the first day of January, 1905, this affiant, together with W. J. Adams, of Louisville, and James N. Norris, of New York City, in the State of New York, entered into a co-partnership for the purpose of buying and selling poultry, butter and eggs in the State of Kentucky; that W. J. Adams contributed $1,500.00; that this affiant contributed $750.00, and that James N. Norris contributed $750.00 to the partnership fund; that the said W. J. Adams owned a one-half interest thereof and was entitled to one-half of the profits of said business; and that this affiant and James N. Norris owned one-fourth interest in said partnership, and were each entitled to one-fourth of the profits of said business; and that said profits of said co-partnership had been divided annually ever since said time; that ever since January 1, 1905, said partnership has conducted said business in the City of Louisville under the firm name of James N. Norris, Son & Company, and that said co-partnership or firm now has a branch office of business at several other points in the State of Kentucky, and has conducted the business under said partnership ever since the first day of January, 1905; that during the existence of said co-partnership it has consigned a large part of its purchases to the defendant, James N. Norris, Son & Company, a corporation of New York, and has paid to it the regular commission of five per cent on poultry sold for said firm by the defendant, and has paid to said corporation the regular commission of one-half of one cent per dozen for eggs consigned to and sold by said corporation for said firm as aforesaid.

William H. Norris.

Affiant further states that ever since the first day of January, 1905, said W. J. Adams has not been authorized in any way by the James N. Norris, Son & Company, the defendant in this case, and is not a stockholder in said corporation and is not an officer or agent thereof, and has not been a stockholder, officer or agent thereof since the first day of January, 1905; that the said W. J. Adams was not authorized by said defendant corporation to accept service of the subpoena or complaint filed herein and has no connection whatever with the defendant corporation, and no authority to act for or on its behalf.

William H. Norris.

Subscribed in my presence and sworn to before me this 7th day of April, 1911.

Chas. R. Ch. Istie,
Notary Public, N. Y. Co.

My commission expires Nov. 30, 1913.
(Seal)

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And on May 15th, A. D. 1911, the following proceedings were had:

The Herndon-Carter Company,
vs.
James N. Norris, Son & Company. } No. 7277.

This day came the complainant by Bruce & Bullitt, its counsel, and filed its Replication to the plea of the defendant herein.

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The Replication above referred to is as follows:

United States Circuit Court, Western District of Kentucky, at Louisville.

The Herndon-Carter Company,
Complainant,
vs.
James N. Norris, Son & Company,
Defendant.
Replication.

For replication to the plea of the defendant, James N. Norris, Son & Company, in this cause, comes the complainant, The Herndon-Carter Company, and reserving to itself the benefit of all proper admissions and disclosures contained therein, joins issue upon said plea and every allegation thereof; and this replicant is ready to prove all the matters contained in its bill as this Honorable Court may direct.

Bruce & Bullitt,
Attorneys for Complainant.

And on May 26th, 1911, the following proceedings were had:

The Herndon-Carter Company,
vs.
James N. Norris, Son & Company. } No. 7277.

This day came the complainant by Bruce & Bullitt, its counsel. Came also the defendant specially by Burton Vance, its counsel. By consent of the parties hereto, it is ordered that the affidavits of James N. Norris and William H. Norris be read as their depositions on the trial of the issues made by the plea of the jurisdiction of this Court, and that leave be, and it is hereby, given to the parties to introduce oral testimony before the Court on the hearing of said issues; that stenographic notes of such testimony be taken by Clarence E. Walker, who is hereby appointed reporter for said cause; that said notes be truly transcribed and the transcript thereof be filed herein as part of the record; and that, in the event of an appeal from the final judgment herein, said transcript of testimony be copied into the record on appeal.

This cause coming on to be heard by the Court on the plea to the jurisdiction and the motion to quash the return upon the subpoena, there were read and heard by the Court,

1. The Bill of Complaint;
2. The subpoena, and Marshal's return thereon;
3. The Special Appearance, objection and plea to the jurisdiction filed by the defendant and the verification thereof;
4. The agreed order as to reading certain affidavits as depositions, and as to hearing oral testimony;
5. The affidavits of James N. Norris and W. H. Norris, which, under the aforesaid agreement, were read as depositions;
6. The oral testimony introduced by the parties and certain documentary evidence, including portions of the record of certain actions and certain papers referred to by the witnesses, all as shown by a transcript of the evidence, which was directed by the agreed order aforesaid to be made and filed herein, and which is now filed, marked "Transcript" and made part of the record, and is ordered to be copied as part of the record on appeal, if an appeal be taken. And the cause having been thus heard, was submitted on the aforesaid plea and motion, and the Court not being sufficiently advised, took time.

The transcript above referred to is as follows:

Circuit Court of the United States for the Western District of Kentucky.

The Herndon-Carter Company,
Complainant,
vs.
James N. Norris, Son & Company,
Defendant.

Louisville, May 26th, 1911.

This case coming on to be heard before His Honor, Judge Walter Evans, on the written motion filed, the following proceedings were had:

Defendant offered in evidence the subpoena and return as follows:

The President of the United States to James N. Norris Son & Company—Greeting:

You are hereby commanded to appear before our Circuit Court of the United States of America, for the Western District of Kentucky, at the Federal Court Hall, in the City of Louisville, on the first Monday in April next to answer a bill in equity exhibited against it in our said Court by The Herndon-Carter Company which you shall in nowise omit, under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of our said Circuit Court hereto affixed, at the Clerk's office of said Court, in Louisville, this 9th day of March, A. D. 1911, and in the 135th year of our Independence.

Attest: A. G. Ronald, C. C. C. W. K. D.
By Henry F. Cassin, His Deputy.

Memorandum: The defendant is to enter its appearance in the suit in the Clerk's office, on or before the 3rd day of April next, the day at which the writ is returnable, otherwise the bill may be taken pro confesso.

A. G. Ronald, Clerk.
By Henry F. Cassin, his Deputy.

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The return on said subpoena was read in evidence as follows:

"Received the within subpoena in Chancery at Louisville, Ky., on the 9th day of March, 1911, and executed same at Louisville, Ky., on the 10th day of March, 1911, on the within named James N. Norris Son & Company by delivering a true copy hereof to W. J. Adams, Manager and Chief Agent, and the highest officer of said Company found in my District. This 10th day of March, 1911.

G. W. Long, U. S. Marshal,
By Lewis Ryans, Dpty. U. S. M."

William J. Adams.

The defendant read in evidence the affidavits of James N. Norris and William H. Norris.

The Court: Have you any other evidence.

Mr. Vance: I have Mr. Adams and the bookkeeper.

The Court: If you want to introduce them let them come.

Mr. Vance: The understanding was that we should bring Mr. Adams for cross-examination.

The Court: If you want to rest on the affidavits, all right.

Mr. Vance: I will file Mr. Adams' Affidavit.

Mr. Bruce: I would prefer that he be introduced as a witness and regularly examined.

Mr. Vance: All right.

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William J. Adams, called for the defendant, being first duly sworn and examined by Mr. Burton Vance, testified as follows:

Q. Where do you reside?

A. I live in New Albany.

Q. In what business are you engaged?

A. Butter and Eggs.

Q. What is the name of your firm?

A. James N. Norris Son & Co.

Q. What persons composes that firm?

A. James N. Norris, W. H. Norris and W. J. Adams.

Q. You are the W. J. Adams?

A. Yes, sir.

Q. How long has that firm been in business?

A. We started the 1st of January, 1905.

Q. Where is your place of business?

A. 133 East Jefferson Street.

Q. In Louisville, Kentucky?

A. Yes, sir.

Q. What business were you engaged in prior to the formation of that partnership?

A. Before that I worked for James N. Norris Son & Co. of New York, on a salary.

Q. What salary did you get and what were your duties?

A. $20 a week and I was agent to buy and ship to them.

Q. When was this partnership formed?

A. January 1st, 1905.

Q. What interest have you in the partnership?

A. A one-half interest.

Q. Have you had that interest from the beginning of the partnership?

A. Yes, sir.

William J. Adams.

Q. What interest have the other two partners?

A. One-fourth each.

The Court: Where do the Norris' live?

Mr. Vance: New York or New Jersey. Norris Son & Co. is a New York corporation.

Q. Have you since 1905 been connected in any way with the corporation known as James N. Norris Son & Co.?

A. No, sir; I have not been.

Q. Were you the agent of that company on the 9th day of March, 1911?

A. No, sir; I was not agent.

Cross-examined by Mr. Bruce:

Q. The corporation James N. Norris Son & Company —the New York corporation—has done business here in Jefferson County and in Louisville, has it not?

A. They opened up here in 1802 as a corporation.

Q. 1802?

A. 1902. That was not the corporation—it was James N. Norris.

Q. Then what happened?

A. Some years after that they incorporated.

Q. When did they incorporate?

A. I cannot remember that.

Q. When did they do business as a corporation?

A. They did business awhile as a corporation before I went in with them; I don't know how long.

Q. When did you go in with them?

A. 1905.

By the Court: Did you go in with the corporation then?

A. No, sir; James N. Norris and W. H. Norris individually.

Q. Did you ever represent the corporation before that?

A. I did.

Q. When did you represent the corporation?

A. Up to 1905.

Q. How long did you represent them?

A. About two years and nine months.

Q. Were you here in Louisville?

A. I was working for the New York firm two years and nine months, and during that time they incorporated.

Q. They incorporated while you represented them?

A. Yes, sir.

Q. And you represented them before they incorporated?

A. Yes, sir.

Q. And you represented them after they incorporated?

A. Yes, sir.

Q. And you represented them at Louisville after they became incorporated?

A. Yes, sir.

Q. When did you cease to represent the New York corporation?

A. January 1st, 1905.

Q. You have not represented the New York corporation since that time?

A. No, sir.

Q. I show you a paper and I ask you if that is your signature?

A. Yes, sir.

Mr. Bruce: I desire to introduce in evidence parts of the record in the case of Leitchfield Deposit Bank vs. James N. Norris Son & Co. in the Jefferson Circuit Court, Common Pleas Branch, Second Division.

The Court: What part of the record, or do you introduce the whole record?

Mr. Bruce: I want to introduce four parts, the petition, answer, amended answer and an affidavit of this witness for a continuance of that case.

The Court: So far as reading any other paper except the affidavit of this witness for a continuance, I don't think you can at present. If you want to read it when your time comes, all right, but you can read his affidavit now. You are cross-examining him now. If you want to make him your witness, it will be a different proposition.

Mr. Bruce: Then I will read this affidavit of this witness for a continuance in that case.

Mr. Vance: I object to the reading.

The Court: He admits he signed the paper and the object is to show that he made different statements, I suppose.

---

The said affidavit was read in evidence as follows:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

Leitchfield Deposit Bank, **Plaintiff,**

vs.

James N. Norris, Son & Co., Defendant.

**Affidavit.**

At Louisville, in the County of Jefferson, State of Kentucky, on this 17th day of April, 1908, before me, the undersigned Notary Public, within and for said County

William J. Adams.

and State, personally appeared W. J. Adams, who, being first duly sworn, deposes and says:

That the defendant, James N. Norris Son & Company, is a corporation organized and existing under the laws of the State of New York, and that this deponent is the Manager of the Louisville office of said corporation. That Emmett Royalty, C. Royalty and are all witnesses whose testimony is of great importance to the defendant in the above entitled action, and that the just and proper effect of their testimony cannot, in a reasonable degree, be obtained without an oral examination in court.

That the said Emmett Royalty is now residing at Hartford, Ohio County, Kentucky; that the said C. Royalty is now residing at Leitchfield, Grayson County, Kentucky, and that the said witnesses may be found at their respective places of residence.

(Signed) William J. Adams.

Subscribed and sworn to before me, by W. J. Adams, this 17th day of April, 1908. My commission expires March 1st, 1910.

Witness my hand and seal this 17th day of April, 1908.

J. H. Lindenberger.

A Copy.
Attest:
Louis Summers, Clerk,
By Katie Noland, D. C.

---

Q. I show you another paper purporting to be an amended answer in that case and I ask you if that is your signature.

A. Yes, sir.

Mr. Bruce: I offer that paper in evidence.

Mr. Vance: I object to it.

The only point is to show that at, at that time represented the defendant in some capacity.

Mr. Bruce: That is exactly it. Whether he represented it only on that occasion is a different proposition.

The said Amended Answer was read in evidence as follows:

---

No. 48,070. Jefferson Circuit Court, Common Pleas Branch, ————Division.

Leitchfield Deposit Bank, Plaintiff,
vs.
James N. Norris Son & Company,
Defendant.

William J. Adams.

Amended Answer.

The defendant, James N. Norris Son & Company, with leave of court first had and obtained for an amendment to its answer herein, says, that it denies that the plaintiff paid the two drafts described in the petition, and denies that it paid either of said drafts, or any part thereof; denies that the said drafts were not drawn for more than the goods were bought at, and denies that the plaintiff accepted the offer or promise or agreement referred to in the plaintiff's petition, as made in the letter attached to said petition as Exhibit A, and denies that the plaintiff notified the defendant that the offer contained in the said letter had been accepted, and denies that upon the face of the said letter or promise contained therein, and relying thereon, that the plaintiff paid said drafts, and denies that the plaintiff notified the defendant that the said drafts had been paid, and denies that the plaintiff notified defendant that said drafts were paid on the faith of the guarantee or offer contained in said letter.

James R. Duffin,
Attorney for Defendant.

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W. J. Adams, being duly sworn, says that he is the local manager of James N. Norris Son & Co., and that the statements contained in the foregoing amended answer, and denials therein, are true, as he verily believes.

W. J. Adams.

Subscribed and sworn to before me by W. J. Adams, this 23rd day of April, 1908. My commission expires March 1, 1910.

J. H. Lindenberger,
Notary Public within and for Jefferson County, Ky.

---

Q. Is this your signature? Handing to witness Exhibit A with the petition in the case of Leitchfield Deposit Bank vs. James N. Norris Son & Co., above mentioned.

A. Yes, sir.

The said Exhibit was read in evidence as follows:

Established 1873.
James N. Norris, Son & Co.
W. J. Adams, Manager.
Shippers of Poultry, Eggs and Butter.
Poultry in Car Lots a Specialty.
232 Brook Street.
Louisville, Ky., June 25, 1907.

To Leitchfield Deposit Bank,
Leitchfield, Ky.

William J. Adams.

Gentlemen:

Several days ago I received a letter from your bank asking me if I would honor drafts drawn on our firm for Mr. E. Royalty.

I will say that our firm has been doing business with Mr. Royalty for about two and a half months and he has been making drafts on us on all shipments, and we have never had a settlement with him since May 1st, until yesterday.

In this settlement he gave me a check for $159.2) which makes he and our firm square. The business he did with us amounted to $7,000 since May 1st, but I will honor all his drafts as long as they are reasonable. What I mean by that is, that he does not draw for more than his goods are bought at. With Bill Lading attached.

We intend to start a house in Leitchfield in fall, and we will probably put Mr. Royalty in as Manager.

Yours respectfully,

Jas. N. Norris Son & Co.

W. J. Adams, Mgr.

Exhibit A.

A Copy.

Attest:

Louis Summers, Clerk,

By Katie Noland, D. C.

---

Mr. Vance: I object to the introduction of that paper.

The Court: Why?

Mr. Vance: I think it is competent to contradict the witness, but not competent to show a valid service on the 11th of May, 1911.

The Court: You don't object to it, then?

Mr. Vance: Except that it don't bear on this point.

The Court: I think it does bear on it and on your side.

Mr. Bruce: We will offer the other parts of the record when it comes to our testimony.

Q. I show you a paper purporting to be the answer of James N. Norris Son & Co., filed in the Jefferson County Court in the case of Commonwealth of Kentucky, On the relation of A. J. Bizot, Revenue Agent of Jefferson County, Kentucky, vs. James N. Norris Son & Co., Inc., and I ask you if that is your signature to that answer.

A. Yes, sir.

Mr. Bruce: I offer this answer in evidence. The material part is again the verification and the fact that "Inc." appears after the name of the Company.

William J. Adams.

The said paper in full was as follows:

No. 1717. Jefferson County Court.

The Commonwealth of Kentucky, on relation of A. J. Bizot, Revenue Agent for Jefferson County, Kentucky, Plaintiff,

vs.

James N. Norris, Son & Company, Inc., Defendant.

Answer.

The defendant, James N. Norris, Son & Company, for answer to the statement filed herein, denies that on the 15th day of September, in each of the years 1900, 1901, 1902, 1903 and on September 1st, 1904, it had the legal or equitable title to personal property consisting of cash, notes, bonds, securities, mortgages, evidences of debt, choses in action, mortgages and other personal property to the value of Twenty-five Thousand Dollars, and denies that it had property of that value subject to taxation by the County of Jefferson or State of Kentucky, for the years 1901, 1902, 1903, 1904 or 1905.

Defendant denies that it was its duty on or as of the various years and dates stated, or any of them, to list with the Assessor of Jefferson County, personal property of the amount or value aforesaid for taxation by the State of Kentucky or County of Jefferson. Defendant denies that it failed to list with the Assessor of Jefferson County or any other officer of this Commonwealth or of Jefferson County any personal property belonging to it for taxation by the State of Kentucky or County of Jefferson for any of the years mentioned in plaintiff's statement except as hereinafter stated. Defendant denies that it has not paid taxes or any tax on personal property belonging to it for the years mentioned in plaintiff's statement, or any of them, except as hereinafter admitted.

Paragraph 2.

Further answering, defendant states that it was not engaged in business in Jefferson County prior to March, 1902, and until said date and thereafter it had no property of any kind situated in Jefferson County, Kentucky. Defendant says that through oversight and inadvertence it failed to list the personal property belonging to it and in its possession September 15, 1902, and September 15, 1903. Defendant says that it was the owner and in possession of personal property on September 15, 1902, to the value of Eleven Hundred and thirty-five dollars, and that said property was liable to taxation for State and

County purposes for the year 1903; it further says that it was the owner and in possession of personal property on September 15, 1903, of the value of Twelve hundred dollars ($1200.00) * * * * which was liable for taxation for State and County purposes for the year 1904; defendant says that said property was not omitted for the purpose of escaping taxation, and it is willing to submit to assessment for said years in the foregoing sum. Defendant says that on September 1, 1904, it was the owner of and in possession of personal property to the value of Thirteen hundred and twenty dollars, and said property was assessed by the Assessor of Jefferson County and it has paid its taxes on said property for said year and is not liable to any further assessment for State and County taxes for said year.

Wherefore, having fully answered, defendant prays to be hence dismissed.

---

W. J. Adams says that he is now, and at all times mentioned herein was, the agent of the defendant in Kentucky and had sole charge of their business in Jefferson County and that the statements contained in the foregoing answer are true as he verily believes.

W. J. Adams.

Subscribed and sworn to before me, this 12th day of December, 1905, by W. J. Adams, at Louisville, Kentucky.

My commission expires at the end of the next session of the Senate.

J. C. Wilhoit,
Notary Public, Jefferson Co., Ky.

---

Q. James N. Norris Son & Co. filed a suit against L. Jacobson and Jennie Jacobson, as The Home Bakery, in the court of Andrew P. Vogt, Justice of the Peace, July 1, 1910, did it not?

A. We filed suit sometime or other.

Q. There were certain dray tickets introduced as evidence in that case, were there not?

A. Yes, sir.

Q. I show you a paper purporting to be a dray ticket, with the name of James N. Noreis Son & Co. at the top of it, dated 11-20-08. That would be November 20th, 1908. Is that a dray ticket that was used by James N. Norris Son & Co. and filed in that case?

A. Yes, sir.

William J. Adams.

Q. I show you another paper of the same kind dated January 1, 1909. Is that likewise a dray ticket issued by James N. Norris, Son & Co.?

A. Yes, sir.

Q. And filed in that suit in the Magistrate's Court?

A. Yes, sir.

Q. I show you another paper of the same kind, dated January 4, 1909—is that a dray ticket issued by James N. Norris, Son & Co. and filed in the Magistrate's Court?

A. Yes, sir.

Q. I show you another paper of the same kind not dated, and I will ask you if that is a dray ticket issued by James N. Norris Son & Co. and filed in that Magistrate court case?

A. Yes, sir.

Mr. Bruce: I read these papers in evidence though I cannot file them, as they are parts of a record in another court.

Mr. Vance: I object to all of them.

The Court: I have permitted you to read papers that he signed but when it comes to reading papers like these it is a different proposition.

Mr. Bruce: I understand that. I intended to get Mr. Vance to agree that they are genuine papers from that record, and I have the Clerk here to testify to them.

Mr. Vance: I don't know about that.

By Mr. Bruce: Did you testify in this Magistrate Court case?

A. Yes, sir.

Q. Did you file these dray tickets as part of your evidence?

A. I don't remember filing them, but they are our tickets.

Q. They are genuine dray tickets of James N. Norris, Son & Co. of the dates mentioned?

A. Yes, sir.

The said papers were offered in evidence as follows:

J. N. Norris, President.
W. H. Norris, V. Pres. and Treas. W. J. Adams, Manager.
All Bills Order No. 39.
Payable Monday. Ledger Folio.

Jas. N. Norris, Son & Co.
Poultry, Eggs and Butter.
Poultry in Car Lots a Specialty.
135 E. Jefferson St.
Home Phone 6849. Cumberland 905A.

William J. Adams.

Louisville, Ky. 190 .

Sold to Home Bakery

2 cases 16 doz. eggs at 24, $14.40 L. Jacobson.

Dray Ticket. Return no goods without first advising us.

Terms strictly cash.

The other three tickets were also read in evidence. Except as to amounts and dates, each was identical with this one just copied.

Q. Did you give any statement to Dun & Co.?

A. No, sir; I did not.

Q. Did you ever have any talk with any representative of Dun & Co. Mercantile Agency?

A. Not that I remember of. Not lately. There was one of them about two weeks ago left a blank for me to fill out.

Q. Did you talk with him?

A. Yes, sir.

Q. Who was he?

A. I don't know his name.

Q. Did you not tell him that this Louisville house was simply a branch of the New York concern?

A. No, sir; I did not.

Q. Did you not tell him that any information concerning this Louisville business would have to be obtained in New York?

A. No, sir; I did not.

Q. What did you tell him?

A. I don't remember what I told him, but I did not tell him that.

Q. Did you give him any information at all?

A. Yes, sir; I told him who the firm was, mentioned the parties.

Q. What else did you tell him?

A. I don't know what I did tell him. I told him what he asked me about.

Q. And you did not refer to New York?

A. No, sir; I did not.

Q. Is there anybody else connected with your establishment?

A. No, sir.

Q. Was there any other man connected with your establishment in Louisville in January of this year?

A. No, sir.

Q. Did you have any interview with a representative of Dun & Co. on January 11th?

A. Not that I remember of.

William J. Adams.

Re-examined by Mr. Vance:

Q. Were you shown this amended answer with your signature at the bottom of it before you swore to it?

The Court: Do you mean to say he swore to it without reading it?

Mr. Vance: I think that is very customary among clients.

The Court: I don't think it ought to be, to swear to anything without reading it. The Court won't give much credit to those things.

Q. Was your attention called to the fact at the time that answer was sworn to that there was any distinction between James N. Norris, Son & Co. as a partnership between you and the two Norris' and the corporation?

A. I don't remember of any.

Q. Here is an affidavit in that same case filed in April, 1908, in which the statement is made that the defendant, James N. Norris, Son & Co. is a corporation organized and existing under the laws of the State of New York. Was that statement called to your attention when you swore to this affidavit?

A. No. sir; I don't remember that it was.

Q. Was that statement true at that time?

A. No, sir; it was not true.

Q. Who prepared the answer for James N. Norris, Son & Co. in the tax case in the Jefferson County Court—what lawyer?

A. Robert Woods, I believe.

Q. That was the 12th of December, 1905?

A. Robert Woods, I think.

Q. In that, this statement is made by you: "W. J. Adams says that he is now, and at all times mentioned herein was, the agent of the defendant in Kentucky and had sole charge of their business in Jefferson County. Was that statement as to the part of the time from January 1, 1905, to December 12, 1905, true?

A. It was true up to 1905.

Q. The last part of it was not true. Is that what you mean?

A. Yes, sir.

Q. Was that called to your attention at the time you signed it?

A. I don't remember anything about that. It has been so long ago.

Q. Were those tickets used prior to the time the partnership was formed?

A. Those tickets were printed and a mistake made by the printer.

William J. Adams.

Q. Who had those tickets printed?

A. Samuels, a man who worked for me at the time, had them printed. I was out of the city at the time and he had them printed, and I told him when I came home that they were wrong.

Mr. Bruce: We object to that last statement.

The objection was sustained as to the statement, "I told him they were wrong when I came home."

Q. How were those tickets printed, as single tickets or as duplicates?

A. Two duplicates and an original.

Q. Is this a copy of the full ticket?

A. Yes, sir.

Q. Where was this man working for you at the time?

A. 133 East Jefferson.

Q. Was it true at the time these were used that James N. Norris was President of your partnership?

A. No, sir.

Q. And that W. J. Noreis was Vice President?

A. No, sir.

Q. And that you were Manager?

A. Yes, I was Manager.

Q. Have you ever used those tickets except those few that that man had printed?

A. I think we used 2,000 of them.

Q. How long would 2,000 last?

A. About five months.

Q. What was the form of ticket used by your firm prior to that time?

A. The same form except that the President and Vice President was not on.

Q. What form have you used since then?

A. The same form.

Q. Is this the form they have used both prior and subsequent?

A. Yes, sir.

The ticket offered in evidence was as follows:

J. N. Norris. W. H. Norris. W. J. Adams.
All Bills Payable Monday.
Order No.....
Ledger Folio.....
Louisville, Ky.....191..
Jas. N. Norris Son & Co.
Poultry, Eggs, Butter and Cheese.
Poultry in car lots a specialty.
133 E. Jefferson St. Home Phone 6849.
226 Brook Street.

William J. Adams.

..... Return no goods without
Salesman. first advising us.
Sold to.....
.....
Terms strictly cash.
.....
.....
.....
.....
.....

---

J. N. Norris. W. H. Norris. W. J. Adams.
All Bills Payable Monday. Order No.....
Ledger Folio.....
Louisville, Ky.....191..
Jas. N. Norris Son & Co.
Poultry, Eggs, Butter and Cheese.
Poultry in car lots a specialty.
133 E. Jefferson St. Home Phone 6849.
226 Brook Street.
..... Return no goods without
Salesman. first advising us.
Sold to.....
.....
Terms strictly cash.

---

Dray Ticket.
J. N. Norris. W. H. Norris. W. J. Adams.
All Bills Payable Monday. Order No.....
Ledger Folio.....
Louisville, Ky.....191..
Jas. N. Norris Son & Co.
Poultry, Eggs, Butter and Cheese.
Poultry in car lots a specialty.
133 E. Jefferson St. Home Phone 6849.
226 Brook Street.
..... Return no goods without
Salesman. first advising us.
Sold to.....
.....
Terms strictly cash.
.....
.....
.....
.....
.....

The above papers, three to a sheet, were superimposed, the yellow above the white and the pink above the yel-

low, so that all three could be made at one writing by the use of carbon paper.

Q. Since you formed this partnership, have you been selling to the corporation of James N. Norris, Son & Co.?

A. We have been consigning to them, yes.

Q. Are these other statements of consignments made in the different years during that time?

A. Yes, sir.

Q. Are these the statements returned to you from the corporation?

A. Yes, sir.

Q. In dealing with James N. Norris, Son & Co. was there any distinction made between your firm and any other person dealing with the corporation as to the charges made by the corporation?

A. They charged the same commission.

Q. I show you now a statement dated December 21, 1906, and I ask you if that is the report made by the corporation James N. Norris, Son & Co. to your partnership of a shipment made to it?

A. Yes, sir.

The paper referred to was offered in evidence and is as follows:

Telephone 441 Chelsea. Established 1873.

James N. Norris, Son & Co.
Commission Merchants.
West Washington Market.

Reference:
New York County Nat'l Bank.

New York, December 21st, '06.

Sold for W. J. Adams, Mgr. Hodgensville.
Car #828.

| | | | | | | |
|---|---|---|---|---|---|---|
| Dec. 20 | 36 Coops | | | | | |
| | | 1313# | Fowls, | 12 | $157.56 | |
| | | 1961# | Chix, | 11 | 215.71 | |
| | | 424# | Box, | 8 | 33.92 | |
| | | 39# | Dux, | 13 | 5.26 | |
| | 7154# | 3417# | Geese, | 12 | 410.04 | |
| | | 7 pr. | Guineas, | 55 | 3.85 | $826.34 |
| | | | | | 826.34 | |
| | | | | | .05 | |
| | | | | | 4131.70 | |

William J. Adams.

| | | | |
|---|---|---|---|
| | Forward, | | $826.34 |
| 744.43 Cost. | | | |
| 683.91 Sales. | | | |
| 60.52 Loss. | | | |
| | Man, | 15.88 | |
| | Handling, | 5.29 | |
| | Coops, | 10.80 | |
| | Freight, | 61.94 | |
| | Cartage, | 7.20 | |
| | Commission, | 41.32 | 142.43 |
| | Net proceeds, | | $683.91 |

Exhibit.

Q. What profit did you make on that shipment for your firm?

A. This shows a loss.

Q. What was the usual commission charged by the corporation James N. Norris, Son & Co. for selling fowls and merchandise consigned to it by you?

A. Five per cent on poultry.

Q. What other charge?

A. 15 cents a case on eggs, a half a cent a dozen.

Q. What profit did the corporation in New York make on that shipment?

A. $41.32.

Q. What loss did your firm make here?

A. A loss of $6.05.

Q. Is this another one of the invoices returned to you from James N. Norris, Son & Co. for a shipment?

A. Yes, sir.

Q. Are those the charges made against your firm by the New York corporation?

A. Yes, sir.

Q. What was the profit on that shipment to your firm?

A. $127.34.

Q. What profit did the New York corporation make?

A. $34.95.

The paper referred to was offered in evidence and is as follows:

Telephone 441 Chelsea. Established 1873.

James N. Norris, Son & Co.
Commission Merchants.
West Washington Market.

References:
New York County Nat'l Bank.

William J. Adams.

New York, February 23, '07.

Sold for W. J. Adams, Mgr., Louisville.

Car #828.

| | | | | | |
|---|---|---|---|---|---|
| Feb. 20 | 20 Coops. | | | | |
| | 4634# | Turk., | 15 | $695.10 | |
| | 8# | Geese, | 11² | .92 | |
| 4642 | 300# | Feed, | 8² | 3.00 | $699.02 |
| | | | | $699.02 | |
| | | | | .05 | |
| | | | | $3495.10 | |
| 59734 | Sales. | | | | |
| 47000 | Cost. | | | | |
| $12734 | Profit. | | | | |
| | | Man, | | 11.88 | |
| | | Handling, | | 2.85 | |
| | | Coops, | | 6.00 | |
| | | Freight, | | 42.00 | |
| | | Cartage, | | 4.00 | |
| | | Commission, | | 34.95 | 101.68 |
| | | Net proceeds, | | $101.68 | $597.34 |
| | | | | | 699.02 |

Here is another one dated February 28th, 1907. What are the charges against that shipment by the New York corporation as commission?

A. $110.48.

Q. And the losses were what?

A. $339.07.

Q. That was a loss to James N. Norris, Son & Co.?

A. Of Louisville?

Q. Your partnership?

A. Yes, sir.

Q. What did the New York corporation make?

A. $110.48.

Q. Have you any of those statements for the year 1905?

A. I could not find any. I don't think I have. I think they were destroyed.

Q. Have you made a search for them since this matter came up?

A. Not a thorough search, I hunted a while yesterday, but I could not find them.

William J. Adams.

The last paper inquired about was offered in evidence and is as follows:

Telephone 441 Chelsea. Established 1873.

James N. Norris, Son & Co.
Commission Merchants.
West Washington Market.

References:
New York County Nat'l Bank.

New York, February 28th, '07.

Sold for W. J. Adams, Mgr., Henderson.

Car $558.

| | | | | | |
|---|---|---|---|---|---|
| Feb. 26. | 86 Long 1 Short Coops. | | | | |
| | 15976# | Fowls, | 12 | $1917.12 | |
| | 350# | Chix, | 11 | 38.50 | |
| | 1024# | Cox, | 8 | 81.92 | |
| | 350# | Turk., | 15 | 52.50 | |
| | 214# | Dux, | 16 | 34.24 | |
| 18575 | 661# | Geese, | 11² | 76.02 | |
| | 2½ | pr. Guineas, | 55 | 1.27 | |
| | 800# | Feed, | 8 | 8.00 | |
| | | | | $2209.67 | $2209.67 |
| | | Forward, | | | $2209.67 |
| | | | | 2209.67 | |
| | | | | .05 | |
| | | | | $11048.35 | |
| 2179.63 | Cost. | | | | |
| 1840.56 | Sales. | | | | |
| $339.07 | Loss. | | | | |
| | | Man, | | 30.00 | |
| | | Handling, | | 10.00 | |
| 10½ per cent shrink, | | Coops 30-20, | | 26.00 | |
| | | Freight, | | 175.28 | |
| | | Cartage 20-15, | | 17.35 | |
| | | Commission, | | 110.48 | 369.11 |
| | | Net proceeds, | | $369.11 | $1840.56 |

Here is one for 1909: What was the charge made in that by the corporation as commission?

A. $44.20.

Q. What was the gain or loss by your firm on that transaction?

A. $118.63 loss.

William J. Adams.

(The paper referred to was offered in evidence and is as follows:)

James N. Norris, Son & Co.
Commission Merchants.
West Washington Market.

References:
New York County Nat'l Bank.

New York, October 28th, '09.

Sold for W. J. Adams, Mgr.

Car #150.

| | | | | |
|---|---|---|---|---|
| Oct. 2. | 33 Coops. | | | |
| | 5493" Fowls, | 13½ | 741.55 | |
| | 636" Chix, | 13½ | 85.86 | |
| | 583" Cox, | 9 | 52.47 | |
| | 4 pr. Guineas, | 50 | 2.00 | |
| | 11 pr. Pigeons, | 20 | 2.20 | |
| | | | $884.08 | $884.08 |
| | | | .05 | |
| | | | $4220.40 | |

$847.67
729.14

$118.53 Loss.

| | | |
|---|---|---|
| Man, | 7.50 | |
| Handling, | 6.00 | |
| Coops, | 9.90 | |
| Freight, | 79.75 | |
| Cartage, | 7.59 | |
| Commission, | 44.20 | 154.94 |
| Net proceeds, | $154.94 | $729.14 |

Q. What was the commission charged by the New York corporation on this shipment?
A. $64.86.
Q. What was the gain or loss to your firm?
A. Loss, $31.79.

The paper referred to was offered in evidence, and is as follows:

James N. Norris, Son & Co.
Commission Merchants.
West Washington Market.

William J. Adams.

References:
New York County Nat'l Bank.

New York, December 26th, '08.

Sold for W. J. Adams, Mgr.

Car #130.

| | | | | |
|---|---|---|---|---|
| Dec. 22. | 57 Coops. | | | |
| | 5654″ Fowls, | $12^2$ | 706.75 | |
| | 612″ Chix, | 11 | 67.32 | |
| | 851″ Cox, | 8 | 68.08 | |
| | 33″ Turx, | 8 | 2.64 | |
| | 778″ Dux, | 11 | 85.58 | |
| | 2988″ Geese, | 10 | 298.80 | |
| | 567″ Geese, Fat, | 11 | 62.37 | |
| | 5 pr. Guineas, | 50 | 2.50 | |
| | $15^2$ pr. Pigeons, | 20 | 3.10 | $1297.14 |
| | | | $1297.14 | |

$1056.26
1024.47

$31.79 Loss.

| | | | |
|---|---|---|---|
| Feed, | | 10.50 | |
| Man, | | 26.25 | |
| Handling, | | 9. | |
| Coops, | | 17.10 | |
| Freight, | | 131.85 | |
| Cartage, | | 13.11 | |
| Commission, | | 64.86 | 272.67 |
| Net proceeds, | | $272.67 | $1024.47 |

Here is one for 1910: What was the commission charged on that shipment by the New York corporation?

A. $108.48.

Q. What was the gain or loss by your firm?

A. $178.88.

The paper referred to was offered in evidence by the defendant, and is as follows:

James N. Norris, Son & Co.
Commission Merchants.
West Washington Market.

References:
New York County Nat'l Bank.

New York, Oct. 28th, '10

Sold for W. J. Adams, Mgr.

Car #204.

William J. Adams.

Oct. 27. 82 Long, 1 Short Coops.

| | | | | |
|---|---|---|---|---|
| 8434″ | Fowls, | 14 | $1180.76 | |
| 6324″ | Chix, | 14 | 885.36 | |
| 641″ | Cox, | 10 | 64.10 | |
| 69 | Dux, | 16 | 11.04 | |
| 168″ | Geese, | 14 | 23.52 | |
| 1 | pr. Guineas, | 60 | .60 | |
| 11² | pr. Pigeons, | 20 | 2.30 | |
| 185″ | Feed, | 100 | 1.85 | $2169.53 |

$1966.50
1787.62

$178.88 Loss.

| | | |
|---|---|---|
| Feed, | 15.00 | |
| Man, | 38.00 | |
| Handling, | 12.00 | |
| Coops, | 26.44 | |
| Freight, | 162.98 | |
| Cartage, | 19.01 | |
| Commission, | 108.48 | 381.91 |
| Net proceeds, | $381.91 | $1787.62 |

Q. Here is one for 1911, April 28: What was the charge for commissions by the New York corporation on that?

A. $140.52.

Q. What was the gain or loss to your firm on the shipment?

A. $37.31 loss.

The paper referred to was offered in evidence, and is as follows:

James N. Norris, Son & Co.
Commission Merchants.
West Washington Market.

Reference:
New York County Nat'l Bank.

New York, April 28th, 1911.

Sold for W. J. Adams, Mgr.
Mayfield 119.

Apr. 25. 90 Cases.

| | | | |
|---|---|---|---|
| 17536″ | Fowls, | 15² | $2718.08 |
| 885″ | Cox, | 10 | 88.50 |
| 16″ | Dux, | 15 | 2.40 |
| 15″ | Geese, | 10 | 1.50 |
| | | $2810.48 | $2810.48 |

| | | | |
|---|---|---|---|
| $2439.00 | | | |
| 2401.69 | | | |
| $37.31 Loss. | | | |
| | Man, | 50.00 | |
| | Handling, | 12.00 | |
| | Coops, | 28.80 | |
| | Freight, | 156.77 | |
| | Cartage, | 20.70 | |
| | Commission, | 140.52 | 408.79 |
| | Net proceeds, | $408.79 | $2401.69 |

Mr. Vance: Those are, I believe, every years, and they are samples.

Q. Since the partnership was formed in 1905, have you been dealing exclusively with James N. Norris, Son & Co. of New York?

A. No, sir.

Q. Have you a book showing all the sales and shipments made during that time?

A. Yes, sir.

Q. Is this the book?

A. Yes, sir.

Mr. Vance: I offer that book in evidence.

The plaintiff objected to the introduction of the book.

The Court: I don't see the necessity for the introduction of the book. He says he did not deal exclusively with the New York corporation.

Mr. Vance: I wanted to show the percentage of consignments that went to the New York house.

Q. I will call your attention to January 21, 1905, a sale to J. A. Long, Portsmouth, Ohio.

A. That is a sale of butter.

Q. What was the profit gained by your firm on that?

A. $67.90.

Q. January 28th another sale to Long: What was the profit to your firm on that?

A. $32.85.

Q. February 11th, Freedman Mfg. Co., Chicago—what was that a sale of?

A. Butter.

Q. Hayes Duster Company?

A. New York, and was of feathers.

Q. Did that firm have any connection with James N. Norris, Son & Co.?

A. No, sir.

Q. Small chickens sold here?
A. Sold in Louisville to different customers.
Q. The Nicholls Produce Company?
A. I don't remember that.
Q. Davis Bros.—who are they?
A. Glasgow, Ky.
Q. What was that sale?
A. Feathers.
Q. About what proportion during the period from 1905, of sales, have been made to other people than the corpotion of James N. Norris, Son & Co.?
A. They got about half the eggs.
Q. Live poultry?
A. They got the greatest part of the live poultry.
Q. Have you and your partners ever had any settlement of accounts since you formed the partnership in 1905?
A. Yes, sir.
Q. Can you show where that appears on the books?
A. We had a settlement March 1st, a year ago.
Q. March, 1910?
A. Yes, sir.
Q. What was the result of your firm's business up to that time?
A. Do you mean the profit?
Q. Everything?
A. Our profit was $13,302.80.
Q. Was a division made of that profit?
A. Yes, sir.
Q. What was that division?
A. It was divided equally.
Q. Between whom?
A. W. J. Adams and James N. Norris and W. H. Norris.
Q. How much did you get?
A. $6,651,40.
Q. How much did James N. Norris and W. H. Norris get?
A. $6,651.40.
Q. What was left belonging to the firm after that division?
A. $1,999.97.
Q. I notice that part of that was Northern stock: What was that?
The Court: We are not going into the settlement of that partnership.

Mr. Vance: I am only going into it to show the existence of the partnership.

Q. You were asked about some Dun man coming to see you: When was that?

A. Two or three weeks ago.

Q. Who was with him?

A. He came in by himself, but a gentleman followed right in after him.

Q. Who was the gentleman?

A. One of the firm of Herndon-Carter Co.

Q. What did you tell him as to what your business was?

The Court: It would not make any difference what he told him.

Re-examined by Mr. Bruce for Plaintiff:

Q. Did I understand you to say with reference to this affidavit in the case of Leitchfield Deposit Bank vs. James N. Norris, Son & Co., that you did not read that affidavit?

A. I think it was read, but I did not read it.

Q. It was read to you?

A. Yes, sir.

Q. You knew what those words meant, did you not?

A. I would think I would, yes.

Q. And you swore to it?

A. Yes, sir.

Q. What do you draw as salary from James N. Norris, Son & Co.?

A. 30 a week.

Q. Who pays that salary?

A. I pay it out of the business.

Q. And you get other compensation besides?

A. One-half of the profit.

Q. Who gets the other?

A. James N. Norris and W. H. Norris.

Q. You stated awhile ago, reading from this book showing the business up to March, 1910, that it showed the distribution of one-half of the profit to you and the other half to James N. and W. H. Norris. Is there anything on this book to show that W. H. Norris gets anything?

A. W. H. Norris collected the last amount.

Q. I am talking about what the book shows.

A. It don't show which one gets it.

Q. It shows here James N. Norris?

A. That was personal. He drew that out in cash.

Q. Looking at the book a moment ago you said that the other half of the profit was divided between W. H.

and James N. Norris. Is there anything on the books that shows that W. H. Norris got anything?

A. W. H. Norris took the check away with him.

Q. Don't it show that the other half of the profit was given to James N. Norris?

A. It just shows the check. It don't show to whom it went.

Q. To whom was the check made?

A. I suppose to W. H. Norris.

Q. You don't know?

A. No, sir.

Q. Have you the check with which the payment of the other half of the profit besides your half was paid—the returned check?

A. I don't know whether I have them or not. I have not got them with me.

Q. Was that a partnership by articles signed?

A. No, sir.

Q. No writing at all?

A. No, sir.

Q. What was your salary prior to January 1st, 1905?

A. $20.

Q. Now, it is $30?

A. That is what I draw out.

Q. And one-half the profit?

A. Yes, sir.

Q. Did you put any money into the firm?

A. Yes, sir.

Q. Who put in the other money?

A. W. H. and James N. Norris.

Q. What money did you put in?

A. $1,500.00.

Q. Have you any statements rendered from Louisville to New York on business done in Louisville prior to January 1st, 1905?

A. I don't know whether I have or not.

Q. Were they the same in form as you have read here?

A. No, sir.

Q. Can you produce any of those statements?

A. I can if they have not been destroyed.

Q. Was that partnership a successor to anything?

A. I suppose so.

Q. Of what?

A. Part of them was partners before—I suppose it was successor to James N. Norris, Son & Co.

William J. Adams. Allen R. Carter.

Q. By the way, is James N. Norris of your firm the sames as the James N. Norris, President of the New York corporation?

A. Yes, sir.

Q. Is the W. H. Norris of your firm the same as the W. H. Norris, who is the Secretary and Treasurer of the New York corporation?

A. Yes, sir.

Q. This concern in Louisville has just exactly the same name as the New York corporation?

A. Yes, sir.

Q. Don't you know that this Louisville concern, since January 1st, 1905, has been shown in the Directory to be a corporation?

A. I don't know.

Q. Have you ever looked at the City Directory?

A. No, sir.

Q. You don't know how it is in there?

A. No, sir.

Q. When the change was made, which you say was January 1st, 1905, from the New York corporation doing business here to this partnership arrangement of which you speak, what kind of notice was given to the trade of such change?

A. I told everybody how the change was made. I went to New York. They called me there and we went into partnership, and when I came home I told all the trade that I had gone into partnership.

Q. You did not publish it?

A. No, sir; I did not publish it.

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Allen R. Carter, called for the plaintiff, being duly sworn and examined by Mr. Bruce, testified as follows:

Q. You are connected with the plaintiff, the Herndon-Carter Company?

A. Yes, sir.

Q. What is the connection?

A. President.

Q. Have you been such for many years?

A. Ever since the death of Mr. Herndon, three years ago. At that time I was Vice President.

Q. And you had at that time been Vice President for some years?

A. Yes, sir.

Q. Did Mr. Adams give you or your corporation any notice at any time that the house of James N. Norris, Son & Co. had ceased to do business as a corporation and

that a partnership of that name was thereafter to do the business?

A. He never gave me any notice at all.

Q. How long had your house been doing business with James N. Norris, Son & Co.?

A. About four years.

Q. Did you ever have any notice at any time that that corporation had ceased to do business in Louisville?

A. No, sir.

Q. Have you had any correspondence with this New York house of James N. Norris, Son & Co.?

A. We have had many hundreds of letters from them.

Q. I show you four letters dated respectively July 13, 1907; August 24th, 1908; March 8th, 1909, and July 7th, 1909, and I ask you to state whether those letters were all received in due course of mail from James N. Norris, Son & Co., New York City.

A. These letters were all received in due course of mail from James N. Norris, Son & Co., New York City.

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The said letters were read in evidence as follows:

Established 1873.

Cable Address
Jannoris.

Telephone
441 Chelsea

James N. Norris, Son & Co.
Commission Merchants.
West Washington Market.

Kansas City, Mo.
Knightstown, Ind.

New York.

Louisville, Ky.
Bryan, Ohio.

July 13th, 1907.

Messrs. Herndon-Carter Company,
Louisville, Ky.

Gentlemen:

Enclosed find sales for car and half of poultry received this week, which we hope will prove satisfactory. The feed charges on part car we estimated here. Mr. Adams advised us that he supplied the feed for car and as he neglected to give us the amount, we pro-rated it on feed basis of former cars; however, should this amount be wrong, Mr. Adams will settle the difference with you down there.

We received a check of $523.87 from you, which we presume must have been intended for our Louisville house, so have forwarded the same to them.

As per our wire, market is in good shape here on both fowls and chickens, and the outlook is favorable for next week. We notice our own collections are commencing

to run lighter and do not think we are going to have any heavy run of fowls from now until after harvest.

Yours very truly,
James N. Norris, Son & Co.

Dict. W. H. N.

(Note.—The part of this letter above the date of same is a printed letter head.) Each of the next three letters is on the same letter head.

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Same letter head.

August 24th, 1908.

Herndon-Carter Co.,
Louisville, Ky.

Gentlemen:

Your favor received and fully noted. In regards to wiring the outlook, we aim to wire just what we think and not willingly mislead anybody. In looking over our telegrams, we find that we wired you exactly the same as we wired our own houses. It is almost impossible to predict the outlook this time of year. Of course, we can tell you just how the market is closing here, but when it comes to predicting the receipts for the following week, it is mostly guess work, for, as you know, there are several new territories starting in now, consisting of what we call fly-by-night shippers who get about one car every two weeks or so. While receipts were heavy last week, our own advices, in fact our own receipts averaged the same as week before. We took particular pains to find out where the stock came from last week and we notice no increase in the regular shippers, but there were quite a few cars here from Iowa, Michigan and Northern Ohio. Last week we closed with fully ten cars on the market outside of six or seven on the track, and we wired you that the outlook was lower on both fowls and chickens. We did not expect over twelve cents on fowls this week, in fact I saw several wires sent out by other people quoting the same thing which, no doubt, had a tendency to hold stock off and the actual fresh receipts this week outside of six or seven on track, foot up about thirty-eight cars.

Fowl market, as I wired you, advanced to thirteen. It looks now as though we would have a fairly steady market until after the holidays, especially on fowls. Chickens are an unknown quantity and liable to ease off at any time. Receipts of chickens, however, are not very heavy this week.

Yours very truly,
James N. Norris, Son & Co.

Dict. W. H. N.

Allen R. Carter.

Same letter head.

March 8th, 1909.

The Herndon-Carter Co.,
Louisville, Ky.

Gentlemen:

Replying to yours of the 4th, will say that we are sorry that we did not keep you properly informed in regard to the market during the past week, It was impossible for any one to form any basis for an even guess. It was purely on account of the fight that has been going on between some of the leaders here that our market was made 20c last week. While the price was quoted 20c, any one could buy poultry right here in the market at 19c, which entailed a loss of thousands of dollars to dealers. This week we could get no price from dealers, and it was late Wednesday before any price was established, and then after a great bi pow-wow. As soon as we saw the state of the market at the end of the week, we wired you to try to keep you off from buying high priced stock, or from coming this way, if you could place your stock to better advantage elsewhere.

In regard to Mr. Adams' high notions, it is pretty hard to keep him down, although he has not bought much stuff this last two weeks, and we cannot understand how he could have bought it much cheaper than he did. He called us up on the phone and asked our advice about buying a car at 13c, and we told him to leave it alone, which he did. We certainly don't care to lose money in Louisville, and more than we do in New York, and would much rather the stock be evenly divided and make a dollar than get it all and work for glory.

I hope to be in Louisville sometime during the next two weeks, and will call on you. In the meantime we will keep you as thoroughly posted as lies in our power.

I cannot understand how Mr. Adams could have been much good to you last week, as we gave him no conditions of the market until he called us up on the phone in regard to buying a car, with the exception of our views.

Yours truly,
James N. Norris, Son & Co.

Dict. J. N. N.

Allen R. Carter. S. H. Grinstead.

Same letter head.

July 7th, 1909.

The Herndon-Carter Co.,
Louisville, Ky.

Gentlemen:

I am just in receipt of your several letters in which you call attention to the unpleasantness you are having with our house in Louisville.

Now, I would like to make myself plain in this matter. As I have always stated to you and every one else, there is never any good in fighting, but, on the contrary, lots of money lost and harm done. Our Mr. Adams, who runs our house in Louisville, has a certain interest in the profits, and it would be pretty hard for me to say that he shouldn't do this or that, which, in his judgment, curtails his profits. I guess we are all anxious to make a good showing in our business, and he claims to me that you have altogether the best of him. With three or four men buying poultry and selling to you on a percentage, and he being tied down to the market price without any buyers on a percentage, gives you a decided advantage.

I wish we could get together in this matter. We have been able to straighten out the misunderstanding with the Jean-Nunnelly concern, which, I believe, benefitted you as much as it did us, and I hope that you and Mr. Adams will see your way clear to fix things between yourselves. I don't hardly feel called upon to enter into this matter, more than to advise Mr. Adams that "War is Hell, and very expensive."

It will not be very long before I expect to be called West, and Louisville will be one of my first points.

Yours truly,
James N. Norris, Son & Co.

Dict. J. N. N.

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S. H. Grinstead, called for the plaintiff, being duly sworn and examined by Mr. Bruce, testified as follows:

Q. You are the President of the S. H. Grinstead Company?

A. Yes, sir.

Q. Do you know the officers of James N. Norris, Son & Co.?

A. Yes, sir.

Q. Do you know James N. Norris, the President?

A. Yes, sir.

Q. State whether or not you have a letter under date of June 25, 1909, from James N. Norris, Son & Co., the

New York corporation?

A. Yes, sir.

Q. I show you a letter of that date addressed to S. H. Grinstead and I ask you if that was received in due course of mail from that company?

A. It was received from James N. Norris.

The letter was offered in evidence and read as follows:

(Same letter head as the four letters to the Herndon-Carter Co.)

June 25th, 1909.

Mr. S. H. Grinstead,
Louisville, Ky.

Friend Sam:

I am surely very sorry that there should be any friction between Nunnelly and Adams. It seems to me that this feeling that seems to crop up with him about Adams selling butter and cheese and other things, is all rot. I cannot see what that has to do with the Jean-Nunnelly business. As far as I am concerned personally, I do not care what Mr. Nunnelly buys, or what he sells, if we cannot have peace, the best thing to do is to let down the bars and have a free for all game. You and I both know what that means, and those younger in the business will have considerable more sense if they do have a great deal less money the time they get as well acquainted with it as we are.

With regard to us controlling Herndon-Carter, we can no more do that, or would even try to to do it, than we would want to dictate to you. You know, Sam, we have known each other a good long time and I don't believe there would ever be any friction between us, but it is the newly weds in the business that stir up the trouble. I have a long letter from Adams saying that he cannot stand it to be treated the way he is. Of course, as he is interested somewhat in the profits of that concern, I cannot blame him. He claims that Nunnelly is buying on the street, paying as high as twelve cents, which establishes the price upon which the outside markets are based, and that in order to keep the market in Louisville down, he has refrained from buying time and time again, but if he can see that there is going to be trouble he will have to look after his own interests. I think the whole shooting match down there ought to be got together somehow, but there is one thing certain, if anything is to be done, it will have to be by the older heads and keep such men

as Nunnelly (that would not live up to the agreement that was entered into) out.

Let us hear from you, Sam, what you think of the situation and what you think best to be done.

Yours very truly,

Dict. James N. Norris.

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Q. Was that letter written in response to a letter from you?

A. It was in response to one written by another party. I this this was written because of one written by Nunnelly, and in his letter to Nunnelly he referred to the fact that he had written to me but not in answer to any letter of mine.

Q. At that time did your Company have any business with James N. Norris individually, or was your business with the corporation of which he was President?

A. We were shipping the corporation.

Q. Do you know Mr. Adams, the Manager of the local business conducted under that name?

A. Yes, sir.

Q. State whether or not at or about the beginning of the year 1905, or at any time, he notified you that the business theretofore conducted in this city under that name had been taken charge of by a partnership?

A. I never heard of the partnership until this suit.

Cross-examined by Mr. Vance:

Q. Were you not in 1905 in the habit of loafing at Adams'?

A. Quite a good deal.

Q. Quite an intimate friend?

A. Yes, sir.

Q. Do you mean to say that you did not hear at that time that he had secured an interest in that business?

A. He never told me anything of the kind at any time.

Q. And you never heard it until this suit was brought?

A. I never heard of the partnership until this suit was brought.

Q. When did you hear anything about it?

A. Mr. Adams borrowed some money from me in 1908—

The Court: What is the importance of all this?

A. When he paid that money back, he gave me a check of James N. Norris, Son & Co. in 1909, and at that time he spoke about his profits of the previous year and what he was going to have. He said "Last year he had lost money but this year he would make money. He said he had given Norris' check, but "that will come out of my

profits." That is all I knew except that he told me at various times that he drew a salary and half the profits.

The Court: I cannot see the slightest importance to this. The only question in this case is, whether, on the 11th of March, 1911, Adams was authorized to be served for this corporation.

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T. A. Summers, called for the plaintiff, being duly sworn and examined by Mr. Bruce, testified as follows:

Q. You are a Deputy under your father, Louis Summers, as Clerk of the Jefferson Circuit Court?

A. Yes, sir.

Q. I show you a bundle of papers and I ask you if that is the original record from the Clerk's office of the Jefferson Circuit Court in the case of the Leitchfield Deposit Bank vs. James N. Norris, Son & Co. in the Jefferson Circuit Court, Common Pleas Branch, No. 48070?

A. It is.

Mr. Bruce: I now offer in evidence certain papers in that suit as follows:

The pleadings and the exhibits filed therewith.

The affidavit for a continuance sworn to by Mr. Adams, and which has already been read in this trial.

The deposition of C. F. Buftin.

The introduction of these papers was objected to by the defendant, but the Court overruled the objection and permitted the papers to be read, to which the defendant, by counsel, excepted.

The said papers are as follows:

Deposition of Buftin.

The deposition of C. F. Buftin, taken between the hours of nine o'clock A. M. and six o'clock P. M., commencing at the hour of 9:30 o'clock A. M. on the 18th day of April, 1908, at the office of C. L. Newcomer, in the town of Bryan, County of Williams, State of Ohio, pursuant to notice hereto attached, to be read as evidence on behalf of the defendant in an action between Leitchfield Deposit Bank, Plaintiff, and James N. Norris, Son & Co., Defendant, pending in the Jefferson Circuit Court, Common Pleas Branch and Second Division.

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C. F. Buftin, being first duly sworn and deposing as follows:

Q. State your name.

A. C. F. Buftin.

Q. Your age?

A. Forty-four.

C. F. Buftin.

Q. Your occupation?
A. Manager for James N. Norris, Son & Co.
Q. Where do you reside?
A. Bryan, Ohio.
Q. How long have you resided at Bryan?
A. Since the 6th day of January, 1908.
Q. Where did you reside before you came to Bryan?
A. Louisville, Ky.
Q. How long did you live at Louisville, Ky.?
A. I lived there from about the 1st of April, 1907, until the 26th day of December, 1907.
Q. By whom were you employed in Louisville, Ky.?
A. James N. Norris, Son & Co.
Q. Are you acquainted with E. Royalty?
A. Yes, sir.
Q. Are you acquainted with W. K. Adams?
A. Yes, sir.
Q. With whom were you employed on the 1st day of October, 1907?
A. James N. Norris, Son & Co.
Q. What relation, if any, has Mr. W. J. Adams with that company?
A. Manager of the Louisville District.
Q. Where did Mr. E. Royalty live on October 2nd, 1907, if you know?
A. Leitchfield, Ky., so far as I know.
Q. If you know, you may state what business he was then engaged in?
A. He was in the poultry and produce business.
Q. Where were you working on the 22nd day of September, 1907?
A. For James N. Norris, Son & Co., at Louisville, Ky.
Q. Were you working in the office or on the road?
A. Working at the office.
Q. Did you have any conversation on or about September 22nd, 1907, with W. K. Adams concerning E. Royalty?
A. Yes, sir.
Q. State that conversation.
A. He told me—I believe this was the day before the 25th—he told me he was going to Leitchfield next morning and he told me not to honor any drafts on E. Royalty until he returned. He told me also to tell the girls in the office not to pay them until next morning.
Q. If you know, you may tell where Mr. Adams went on September 25th, 1907?
A. He went to Leitchfield, Ky.

C. F. Buftin.

Q. If you know, you may state how long he was at Leitchfield?

A. I do not know how long he was at Leitchfield, but he returned several days later.

Q. Did you have any telephone communication with W. K. Adams while he was at Leitchfield that time?

A. Yes, sir.

Q. Where were you?

A. At the office of James N. Norris, Son & Co., Louisville, Ky.

Q. Did you call Mr. Adams, or did he call you?

A. He called me.

Q. You may state the conversation you had with Mr. Adams over the telephone?

A. He told me to pay the draft on E. Royalty that would come before he came home.

Q. Do you know when he returned home to the Louisville office?

A. No, I can't state just exactly when.

Q. What is your best recollection?

A. Probably he was gone three or four days, to the best of my recollection.

Q. Did you have any conversation with Mr. W. K. Adams after he returned from Leitchfield?

A. Yes, sir.

Q. Was that before or after October 7th?

A. That was before.

Q. Where was this conversation?

A. At the place of business, at the office.

Q. Who was present?

A. Well, I don't believe there was anybody present.

Q. In this conversation you talked about E. Royalty's matters?

A. Yes, sir.

Q. State whether or not you heard any conversation which Mr. Adams had over the telephone concerning the E. Royalty draft?

A. Yes, sir.

Q. When was this conversation?

A. Along about October 2nd.

Q. Where were you?

A. At the office.

Q. Who was talking?

A. Mr. Adams.

Q. Was any one present, as far as you know?

A. I believe that the two girls were at the office.

C. F. Buftin.

Q. Did Mr. Adams call some one over the telephone, or was called?

A. He called for some one.

Q. State what he said when he called for some one?

A. He called for Mr. Gardner, Cashier of the Leitchfield Bank.

Q. Did you hear what Mr. Adams said over the telephone at that time?

A. Yes, sir.

Q. You may give that conversation, or the substance of it, as near as you can recollect.

A. Mr. Adams said that he would not pay any more E. Royalty drafts, and they had a lengthy conversation over the 'phone and that he would not honor any more drafts drawn by E. Royalty upon James N. Norris, Son & Co. There were some sharp words said.

Q. Have you given the conversation as near as you recollect the same?

A. Yes, sir.

Q. When was this conversation over the telephone?

A. October, 2nd day of October, 1907.

Q. Do you remember what time of the day it was?

A. It was in the afternoon along about four o'clock. It was a short time before I went home to eat. I quit work about five o'clock.

Q. Did you ever have any conversation with the Leitchfield Deposit Bank?

A. No, sir.

Q. Or with any of the officers at that bank?

A. No, sir.

Said deposition is properly certified to by and for the Scott Notary Public for Williams County, Ohio, but there being no question as to the certification of this deposition, and it not being important in this cause, the same is omitted.

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The Petition.

No. 48,070. Jefferson Circuit Court, Common Pleas Branch, ————Division.

Leitchfield Deposit Bank, Plaintiff,
vs.
James N. Norris, Son & Co., Defendant.

Petition Ordinary.

The plaintiff, Leitchfield Deposit Bank, states that it is now and was at all times hereinafter mentioned, a corporation at Leitchfield, Ky., created and existing un-

der and by virtue of the laws of the state of Kentucky, with power to contract and be contracted with, to sue and be sued and to transact a general banking business under the laws of Kentucky; that the defendant, James N. Norris, Son & Co. is now, and was at all times hereinafter mentioned, a corporation created and existing by virtue of the laws of the state of New Jersey, with power to contract and be contracted with, to sue and be sued and to conduct a general merchandise business, issue letters of credit, draw and accept and pay bills of exchange and other negotiable instruments.

Plaintiff says that the defendant in a letter dated June 25th, 1907, which was addressed and delivered to the plaintiff, and which is filed herewith as part hereof marked Exhibit A, promised and agreed to honor and pay all drafts drawn on said James N. Norris, Son & Co. by one E. Royalty and presented at said bank for payment, provided said drafts were not for more than the goods were bought for and in payment for which they were drawn and bills of lading were attached thereto. That said E. Royalty did on October 3rd, 1907, present to said bank and request payment on two drafts of the same date, one for $162.25 and the other for $174.71, drawn by said E. Royalty on defendant and given in payment for goods purchased by said E. Royalty and shipped defendant, which amounts were not more than the goods were bought at, with bills of lading and express receipts attached thereto. Plaintiff says it accepted the agreement and promise of the defendant in said letter to honor said drafts as aforesaid and defendant had notice of said acceptance, and relying on and on the faith of said agreement the plaintiff did on October 3rd, 1907, pay to the said E. Royalty $336.96, the amount of the two above mentioned drafts, both of which drafts are filed herewith as parts hereof marked Exhibits B & C respectively. Whereupon it notified the defendant that said drafts had been so paid and that they were paid on the faith of the guaranty in said letter and presented same with bills of lading attached and demanded payment of the same from defendant, but defendant refused, and still refuses, to honor said drafts or either of them, or to pay plaintiff as agreed and promised in said letter; that no part of said amount, nor any interest thereon, has been paid by either the defendant or E. Royalty, and same is long past due.

Wherefore, the plaintiff prays judgment against the defendant for $336.96, with interest thereon from Octo-

ber 3rd, 1907, until paid and its costs herein expended, and for all proper relief.

Gregory and McHenry,
Attorneys for Plaintiff.

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Exhibit A filed with this petition is the guaranty heretofore copied in this record, and Exhibit B is a draft drawn by Emmett Royalty on James N. Norris, Son & Co. for $162.25, and Exhibit C is a draft, same on same, for $174.71. These latter two drafts are not copied in this transcript, as they have no bearing whatever on the subject matter of this controversy.

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Same Caption.

Answer.

The defendant, James N. Norris, Son & Company, for an answer to plaintiff's petition, says, that it admits that it is a corporation, but denies that it is organized or exists under and by virtue of the laws of the state of New Jersey, and says that it was created, organized and now exists as a corporation under and by virtue of the state of New York.

The defendant admits that it executed and delivered to the plaintiff the letter attached to plaintiff's petition as part thereof, marked Exhibit A. The defendant says it has no knowledge or information sufficient to form a belief, and therefore denies, that said E. Royalty, named in the plaintiff's petition, did, on October 3rd, 1907, present to the plaintiff, or request payment on two drafts dated October 3rd, 1907, one for the sum of $162.25 and one for the sum of $174.71, the said drafts being drawn on this defendant, or that bills of lading or express receipts for any goods whatsoever were attached to the said drafts.

The defendant denies that the plaintiff did on October 3rd, 1907, pay these said drafts to the said E. Royalty in reliance upon the agreement contained in the said letter marked Exhibit A filed with plaintiff's petition. Denies that the plaintiff notified the defendant that it had paid the said drafts on the faith of the agreement contained in the said letter.

Further answering the plaintiff's petition herein, the defendant says that it admits the execution of the letter attached to plaintiff's petition as part thereof, marked Exhibit A, but defendant says that long before the 3rd day of October, 1907, and long before the alleged execution of the drafts mentioned in plaintiff's petition and attached thereto, marked Exhibits B and C respectively,

this defendant notified the plaintiff that it would honor no more drafts drawn upon it by the said E. Royalty and instructed plaintiff not to pay any more such drafts, and to place no further reliance upon the said letter, and the defendant thereupon entirely withdrew and rescinded the said letter and offer to pay therein.

Wherefore, the defendant having fully answered plaintiff's petition herein, prays that said petition be dismissed, and that it be given judgment for all costs herein expended, and for all other proper relief.

James R. Duffin,
Attorney for deft.

W. J. Adams, being first duly sworn, says that he is local Manager of the defendant in the above entitled action, and, as such officer, is duly authorized to verify the foregoing answer.

The affiant further says that the statements contained in the said answer are true as he verily believes.

Subscribed and sworn to before me by W. J. Adams, this 4th day of January, 1908. My commission expires March 1st, 1910.

_____

Notary Public within and for Jefferson County, Kentucky.

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Same Caption.
Reply.

The plaintiff, the Leitchfield Deposit Bank, for reply to the second paragraph of defendant's answer herein, denies that long before the said 3rd day of October, 1907, and long before the alleged execution of the drafts mentioned in plaintiff's petition, and attached thereto and marked Exhibits B and C respectively, that the defendant notified the plaintiff that it would honor no more drafts drawn by the said E. Royalty upon it, and denies that the defendant instructed the plaintiff not to pay any more drafts and to place no further reliance upon the said letter, and denies that the defendant thereupon entirely withdrew and rescinded the said letter and the offer contained therein.

Wherefore, plaintiff prays as in its petition.

Gregory & McHenry,
Attorneys for plaintiff.

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Same Caption.
Amended Reply.

The plaintiff by leave of court amends its reply herein and for amendment, denies that long before the said 3rd

day of October, 1907, or at any time, or long before the alleged execution of the drafts mentioned in plaintiff's petition, and attached thereto as Exhibits B and C respectively, or at any time, the defendant notified the plaintiff that it would honor no more drafts drawn upon the defendant by the said E. Royalty, and plaintiff denies that the defendant instructed the plaintiff not to pay any more such drafts, or to place no further reliance upon the said letter; and it denies that the defendant thereupon, or at any time, entirely, or at all, withdrew or rescinded the said letter or offer contained therein.

Wherefore prays as in the petition herein, and for all proper relief.

Gregory & McHenry,
Attorneys for plaintiff.

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The affidavit is the same affidavit for a continuance that is heretofore offered in evidence, copied herein.

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The Amended Answer is the same Amended Answer heretofore put in evidence and copied into this record, page 9.

Mr. Bruce: As to this Tax Suit in the County Court, Mr. Vance and I have agreed that the papers I have before me are the original record of that Tax Suit, and that we need not send for the Clerk of the Jefferson Circuit Court to prove their verity, and we will consider as read in evidence the statement in the case of Commonwealth on relation of A. J. Bizot, Revenue Agent for Jefferson County, Kentucky, against James N. Norris, Son & Co., incorporated, date of filing the petition being July 19, 1905.

The Answer filed in the case.

These papers are as follows:

The Statement.

Jefferson County Court.

The Commonwealth of Kentucky, on relation of A. J. Bizot, Revenue Agent for Jefferson County, Kentucky, Plaintiff,
vs.
James N. Norris, Son & Company, Incorporated, Defendant.

Statement.

The relator, A. J. Bizot, says that he is the duly appointed, qualified and acting Revenue Agent in the County of Jefferson for the State of Kentucky, and, as such agent, for and on behalf of said County and State, he brings this

action to have certain properties, as hereinafter stated, assessed for State and County taxation.

That the defendant, James N. Norris, Son & Company, is a corporation, duly organized and existing under and by virtue of law, with power to sue and be sued, contract and be contracted with, and with such other privileges and purposes as to enable it to hold property, real, personal and mixed, and be liable for State and County taxes therefor.

The plaintiff further says that the defendant did, on the 15th day of September, in each of the years 1900, 1901, 1902, 1903, and on September 1, 1904, have the legal and equitable title to personal property consisting of cash, notes, bonds, securities, mortgages, evidences of debt, choses in action, merchandise and other personal property to the value of Twenty-five Thousand ($25,000.00) dollars, and all of which property was subject to taxation by the County and State aforesaid for the years 1901, 1902, 1903, 1904 and 1905.

The plaintiff says that it was the duty of the said defendant on and as of the various years and dates before stated, at which said property was duly assessable for the several and various years before stated, to have listed with the Assessor of Jefferson County the aforesaid personal property to the amount and value as aforesaid for taxation by this Commonwealth and Jefferson County; but this plaintiff says that the defendant failed to list with the Assessor of Jefferson County, or with any other officer of this Commonwealth or of Jefferson County, authorized to act in the premises, the aforesaid personal property or any part thereof, or to any value for taxation by this Commonwealth or Jefferson County for any of the years before stated. And the plaintiff says that said defendant has not paid to this Commonwealth, or to the County of Jefferson, the taxes or any tax on the aforesaid personal property in the amount aforesaid, or any part thereof, in or for any of the years before stated.

Wherefore, the plaintiff prays that the said property be now assessed for the amounts stated hereinabove against the defendant for each of said years, viz., 1901, 1902, 1903, 1904 and 1905, and that the taxes due thereon be affixed and charged thereon, and that the rates of taxation be calculated according to the rates duly fixed for the various mentioned years for State and County taxation, and that defendant be adjudged to pay a penalty due the relator herein of twenty per centum on the aggregate

amount of taxes, for the cost of this proceeding, and for all proper and general relief.

The Commonwealth of Kentucky,
By A. J. Bizot, Revenue Agent,
Jefferson County, Ky.

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The Answer.

Jefferson County Court.

The Commonwealth of Kentucky, on relation of A. J. Bizot, Revenue Agent for Jefferson County, Kentucky, Plaintiff,
vs.
James N. Norris, Son & Company, Inc., Defendant.
No. 1717.

Answer.

The defendant, James N. Norris, Son & Company, for answer to the statement filed herein, denies that on the 15th day of September, in each of the years 1900, 1901, 1902, 1903 and on September 1st, 1904, it had the legal or equitable title to personal property consisting of cash, notes, bonds, securities, mortgages, evidences of debt, choses in action, mortgages and other personal property to the value of Twenty-five thousand dollars, and denies that it had property of that value subject to taxation by the County of Jefferson or State of Kentucky, for the years 1901, 1902, 1903, 1904 or 1905.

Defendant denies that it was its duty on or as of the various years and dates stated, or any of them, to list with the Assessor of Jefferson County, personal property of the amount or value aforesaid for taxation by the State of Kentucky, or County of Jefferson.

Defendant denies that it failed to list with the assessor of Jefferson County or any other officer of this Commonwealth, or of Jefferson County, any personal property belonging to it for taxation by the State of Kentucky or County of Jefferson for any of the years mentioned in plaintiff's statement, except as hereinafter stated. Defendant denies that it has not paid taxes or any tax on personal property belonging to it for the years mentioned in plaintiff's statement, or any of them, except as hereinafter admitted.

Paragraph 2.

Further answering, defendant states that it was not engaged in business in Jefferson County prior to March, 1902, and until said date and thereafter it had no property of any kind situated in Jefferson County, Kentucky. De-

fendant says that through oversight and inadvertence it failed to list the personal property belonging to it and in its possession September 15, 1902, and September 15, 1903. Defendant says that it was the owner and in possession of personal property on September 15, 1902, to the value of Eleven Hundred and Thirty-five Dollars, and that said property was liable to taxation for State and County purposes for the year 1903. It further says that it was the owner and in possession of personal property on September 15, 1903, of the value of Twelve Hundred Dollars ($1,200.00) * * * which was liable for taxation for State and County purposes for the year 1904. Defendant says that said property was not omitted for the purpose of escaping taxation, and it is willing to submit to assessment for said years in the foregoing sum. Defendant says that on September 1, 1904, it was the owner of and in possession of personal property to the value of Thirteen Hundred and Twenty Dollars, and said property was assessed by the Assessor of Jefferson County, and it has paid its taxes on said property for said year and is not liable to any further assessment for State and County taxes for said year.

Wherefore, having fully answered, defendant prays to be hence dismissed.

W. J. Adams says that he is now, and at all times mentioned herein was, the agent of the defendant in Kentucky and had sole charge of their business in Jefferson County, and that the statements contained in the foregoing answer are true as he verily believes.

W. J. Adams.

Subscribed and sworn to before me, this 12th day of December, 1905, by W. J. Adams, at Louisville, Kentucky.

My commission expires at the end of the next session of the Senate.

J. C. Wilhoit,
Notary Public, Jefferson, Co., Ky.

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Mr. Bruce: I also introduce in evidence, and we consider as read, the summons from the Court of Justice of the Peace Andrew Vogt in the case of James N. Norris, Son & Co. vs. L. Jacobson and Jennie Jacobson, as the Home Bakery, that being the summons in the case in which the dray tickets were filed as heretofore explained.

The said Summons is as follows:

In the Court of Andrew P. Vogt, Justice of the Peace.

The Commonwealth of Kentucky. To the Sheriff or any Constable of Jefferson County:

William J. Adams.

You are commanded to summon L. Jacobson and Jennie Jacobson, as Home Bakery, to appear before me, Andrew P. Vogt, a Justice of the Peace of Jefferson County, Kentucky, at my office, No. 215 South Fifth Street, Louisville, Kentucky, at nine o'clock A. M. five days from service hereof, unless the five days terminate on a legal holiday; and in that event, to answer on the succeeding day, a claim filed in my court by the plaintiff herein, Jas. N. Norris, Son & Co., for money due by statement amounting to forty-five 00-100 dollars, with interest thereon at the rate of six per cent per annum from day of 191—, until paid, and warn them that upon their failure to answer, the claim will be taken for confessed.

Given under my hand this 21st day of July, 1910.

Andrew P. Vogt, J. P. J. C.

The return on said summons is in words and figures as follows, to-wit:

"Executed on the 22nd of July, 1910, by delivering the defendant, L. Jacobson and Jennie Jacobson, as Home Bakery, a true copy of the within summons. Set for trial before Andrew P. Vogt, J. P. J. C. on the 27th day of July, 1910, at 9 A. M.

Geo. Weber, C. J. C.

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William J. Adams recalled for further cross-examination by Mr. Bruce, testified as follows:

Q. Has there been any change in the method of doing business of the New York House or corporation, James N. Norris, Son & Co., and the house of James N. Norris, Son & Co. here in Louisville since January 1st, 1905?

A. Yes, sir.

Q. What change.

A. We keep our books differently.

Q. What I mean is, was the business of your Louisville house during 1911, 1910, 1908, 1907, 1906 and 1905 the same during all those years.

A. Yes, sir.

Q. The business done now by your house in Louisville and the New York house is the same as it was in 1907?

A. Yes, sir.

Q. Are the relations between James N. Norris, Son & Co. in Louisville and the New York corporation the same now as they were in 1907?

A. Yes, sir.

Q. And in 1908?

A. Yes, sir.

Q. And in 1906?

A. Yes, sir.

Q. And in 1905?

A. Yes, sir; the first was in 1905.

Q. And have your own relations changed any in any way to the New York corporation since February, 1905?

A. No, sir; they have not changed.

The Court: Do you mean to take back your statement that you ceased to do business as a corporation the 1st day of January and formed a corporation?

A. Yes, sir.

The Court: You stated your relations were the same.

Mr. Vance: He says his relations were the same during all those years since 1905.

The Court: All right.

By Mr. Bruce: Your relations to the New York corporation are the same to-day that they were throughout the years 1907 and 1908.

A. Yes, sir.

Q. Your relations to the New York corporation were the same on March 10, 1911, as they were throughout the years 1907 and 1908.

A. Yes, sir.

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Margaret Lyons, called for the defendant, being duly sworn and examined by Mr. Vance, testified as follows:

Q. What business are you with?

A. A. H. Bowman & Co.

Q. What are you doing there?

A. Bookkeeper.

Q. What business were you in in 1904 and 1905?

A. I was with James N. Norris, Son & Co.

Q. How long had you been engaged by that Company prior to January 1, 1905?

A. I started there in April, 1904.

Q. How long did you remain with James N. Norris, Son & Co. after January 1, 1905?

A. I think it was two years ago last December.

Q. On January 1st, 1905, was there any change made in the way you kept your books?

A. Yes, sir.

Q. Tell how that was—what change was made?

A. The change was made that it was a partnership. Prior to that time it was not a partnership.

Q. What difference did it make in the bookkeeping?

A. Of course, the profits were supposed to be divided.

Margaret Lyons.

Q. Were they divided after that time on the books?

A. They were, but they had no settlement while I was with them.

Cross-examined by Mr. Bruce:

Q. Did you draw checks for this concern while you were employed by them?

A. Did I write the checks?

Q. Yes.

A. Yes, sir.

Q. You filled out the body of the check?

A. Yes.

Q. Did you ever draw a check for the distribution of the profits?

A. No, sir. There was no division while I was with them.

Q. Did the books you kept show the individual accounts of the various members of this alleged firm, or partnership?

A. No.

Q. Mr. Adams had an individual account?

A. Yes, sir; but I did not keep that.

Q. Who did keep that?

A. I suppose Mr. Adams did himself.

Q. Did you keep any account showing the salary paid to Mr. Adams?

A. Yes, sir.

Q. Did you ever send any statement to New York showing the condition of the business?

A. A financial statement? We sent a statement every year.

Q. To whom were those statements sent, to James N. Norris?

A. They were sent to the New York house.

Both sides here rested, and this was all the evidence introduced on the hearing of the motion.

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And on May 27th, A. D. 1911, the following proceedings were had:

Herndon-Carter Company,
Complainant,
vs.
James N. Norris, Son & Co.,
Defendant.

Decree.

The Court now being sufficiently advised of the questions arising upon the motion heard yesterday to quash

the return of the Marshal on the subpoena issued herein, delivered an opinion in writing, which is filed. Upon consideration of the averments of the bill, and of the testimony heard, the Court makes the following

Findings of Fact.

That is to say, the Court finds:

First, That the defendant—shown by the bill to be a body corporate created and existing under the laws of the State of New York—did not at any time in March, 1911, nor at any time within any one of the five years immediately preceding that time, carry on business in the State of Kentucky.

Second. That the cause of action alleged in the bill of complaint arose in the State of New York, and not in the State of Kentucky.

Third. That W. J. Adams, who is mentioned in the return of the Marshal upon the subpoena herein, was never an officer of the defendant company; and,

Fourth. That the said Adams was not at any time in March, 1911, a manager or an agent of the defendant for any purpose, and that he had not then any authority from the defendant to act as its manager or agent, nor in any manner to receive service for it or in its behalf of the subpoena issued upon the bill of complaint in this cause.

And the facts being such, it is now ordered, adjudged and decreed by the Court that the return upon said subpoena, which is in the words and figures following, viz:

"Received the within subpoena in Chancery and one copy at Louisville, Ky., on the 9th day of March, 1911, and executed same at Louisville, Ky., on the 10th day of March, 1911, on the within named James N. Norris, Son & Company by delivering a true copy hereof to W. J. Adams, Manager and chief agent and the highest officer of said Company found in my district. This 10th day of March, 1911, ~~should be, and the same is, quashed, set aside, and held for naught.~~

G. W. Long, U. S. Marshal,
By Lewis Ryans, Dpty. U. S. M."

should be and the same is quashed, set aside and held for naught

And the complainant, by its counsel, thereupon came and stated to the Court that it could not otherwise secure service of a subpoena herein upon the defendant within this district, and for that reason did not desire to make further effort to do so, and asked the Court now to render its judgment upon the plea to the jurisdiction of the Court herein, and the Court being of opinion that it had not acquired and had not jurisdiction to hear and determine the cause, it is now ordered, adjudged and decreed that this cause be, and it is, dismissed for want of jurisdiction.

Such dismissal, for similar reasons, must be without costs to either party.

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The Opinion above referred to is as follows:

United States Circuit Court, Western District of Kentucky.

Herndon-Carter Co.
vs.
James N. Norris, Son & Co.

Opinion.

The complainant corporation is a citizen of Kentucky. The defendant, another corporation, though a creation of the laws of New York, and a citizen of that State, having been sued here, has filed a plea to the jurisdiction and has moved the Court to quash the return of the Marshal made upon the subpoena, whereby it was attempted to get the defendant before the court by service upon one W. J. Adams, stated in the Marshal's return to be agent for the defendant. Testimony was introduced in support of the plea and motion to quash, explicitly to the effect that Adams was not the defendants' agent for any purpose at the time the service was attempted to be made. This proof was made a prima facie case against the return which the complainant has sought to overcome by proof of a very wide range of isolated and disconnected circumstances, which, at various times, had occurred long before March, 1911, and by proof that Adams had made statements several years ago which showed him then to have been defendants' agent for certain purposes, but there was, at the hearing, no direct testimony that such agency was continued, nor that it existed in March last, nor, indeed, that at that time the corporation defendant was carrying on business in this State at all, though it is shown that a co-partnership exists here now, and has, since January, 1905, with a name precisely the same as that of the defendant, and that two of the officers or stockholders of the corporation are partners in the firm. This partnership most probably was doing business in some respects in close relations with the defendant, but nevertheless the partnership and the corporation were in law and in fact different entities and an agency of one of the partners, for the corporation cannot fairly nor legitimately be inferred from mere dealings and business relations between the two in matters mercantile. Such business transactions or relations might be altogether independent of any relation of agency, and much of the testimony tends to show that such was the case. Nor did the transactions be-

tween complainant and defendant, out of which the alleged cause of action arose, take place in Kentucky, although the complainant doing business here shipped hence to the defendant in New York certain articles of merchandise to be sold on commission in the latter city by defendant, who did business there. The complainant alone dealt with the merchandise in Kentucky, while all that was done in respect to it by the defendant was done in New York. Ordinarily, as we have often held, a defendant has the right to be sued at home, and cannot be deprived of that advantage and be compelled to litigate elsewhere unless in some way he consents that there may be service upon him in another jurisdiction, or unless he voluntarily enters his appearance there, which has not been done in this instance. Corporations are entitled to the full benefit of this principle, and service of process upon them in foreign jurisdictions can only be lawful and binding when, directly or impliedly, they have consented that service upon them may be made by service upon some person whom they have authorized to receive it for them. Authorization is essential, though it may be proved by indirect as well as by direct testimony. In short, service upon a corporation can be sufficient only when it is made in its behalf upon one of its officers or agents, and if upon the latter, he must in some way have authority to receive the same for and on behalf of the corporation. If a corporation does not carry on business in the State where it is sued, service made upon any officer or agent casually in that State is invalid. If a corporation, though a foreign one, does actually carry on business in the State where the suit is brought, service there upon an authorized agent may be sufficient, and especially in suits upon causes of action which arose there, and in such latter instances it may sometimes be presumed that a previous agency continues for the purpose of process in suits upon causes of action so arising. To obviate or lessen difficulties growing out of uncertainty in such matters Section 194 of the Kentucky Constitution requires all corporations doing business in this State to have authorized agents here upon whom service of process may be had. Section 571 of the Kentucky Statutes, enacted to carry Section 194 of the Constitution into effect, provides that evidence of such agencies shall be filed in the office of the Secretary of State. It may be important to note that nothing of this sort was done presumably because the defendant did not carry on business in this State within the meaning of its laws. Section 571 made it criminal to fail to do what it required, and we

may not presume that the law was violated and a penal or criminal offense committed.

Obviously the sole question involved in the motion to quash is, whether Adams was the defendants' agent to receive service in March, 1911. As we have seen, the direct and positive proof was to the contrary, and no direct or positive testimony showed him to be such. The testimony of complainant as to agency at any time related to periods several years before March, 1911, and to the special matters to which complainant's evidence referred. The complainant, averring that Adams was agent for the defendant in March, 1911, in such form as would authorize service upon him, and thus bring the defendant into court in a foreign jurisdiction, must establish the fact by such clear proof as should fairly satisfy the Court of the existence of such agency at the time the service is attempted. The fact cannot be presumed. It must be proved. The proof has not satisfied the Court that the defendant has in fact carried on business in this State (within the meaning of the constitutional and statutory provisions to which we have referred) since January, 1905. It has, however, been shown that the defendant in New York received there business in its line from customers in Kentucky. But the defendant's part of that business was carried on in New York and not in Kentucky. There is no pretense that Adams is now, or that he ever was, an officer of the defendant. That he may at remote times have been, in some way and for certain specific purposes, an agent of the defendant might be admitted. That he made statements to justify such an inference in respect to definite, but remote, transactions was clearly enough proved. But all these matters, which occurred years ago, do not show that at any time within the last several years Adams was clothed by the defendant with any agency or authority to receive notice on its behalf of the pendency of an action in court in such way as to bring the defendant before the court for judgment. Yet at last this is the sort of agency requisite to support a service of process. Like all other delegated authority it must depend upon the act or consent of the supposed principal. The facts and circumstances, gathered with most industrious care, offered to support the service, do not, in our opinion, do so, and besides relating to special matters only, are not sufficiently recent to show the sort of agency required for the present emergency. An inference that the requisite agency existed in March, 1911, would be drawn at very long range and supported more by ingenious argument than by substantial testimony. The light afforded by the testimony

comes from a period too remote. It may possibly show what existed long ago, which is not very material, but not what exists now, which is especially so.

The law applicable to the point in contest may be found in cases like St. Clair vs. Cox, 106 U. S. 350; Peterson vs. Chicago, &c., R. R. Co., 205 U. S. 364, 388, 390; Green vs. Chicago, &c., R. R. Co., 205 U. S. 350; Celia Commission Co. vs. Bohlinger, 147 Fed. 422.

The complications in the premises grow, of course, out of the fact that the corporation defendant and the co-partnership referred to in the testimony had the same names, one concern being here and the other in New York, but while that fact might excite suspicion, it does not of itself show that the defendant corporation authorized Adams to be its agent here for the receipt of service of process issued in suits brought against it in Kentucky, nor that it consented that process attempted to be served upon it in that way in Kentucky should bind it. Nor has any state of fact been shown which would authorize the inference that it was the defendants' duty at any time to notify the complainant of the change to or formation of the partnership in January, 1905. Complainant did not begin its transactions with defendant until in December, 1906. It knew nothing of what had occurred in the suits and proceedings between other persons and the defendant, alluded to in the testimony, and had no claim to be notified of the partnership formed in 1905 as a change from the corporate work in 1904. Therefore, nothing analogous to estoppel can operate.

We by no means regard much of the testimony proffered by the complainant as competent against the defendant, but have let it all in and have accorded all of it any weight to which it could possibly be entitled. Nevertheless, we have not been able to reach the conclusion that the sort of agency necessary to support the service on Adams existed in March, 1911. He was interested in the partnership here, but not in the corporation in New York. His firm dealt, among others, with the defendant corporation by sending to it merchandise to be disposed of on commission, but then so did the complainant. In both instances the defendant seems to have been a factor—an agent—for the shippers of merchandise. The defendant corporation in these matters was more the agent of the firm than the latter was of the corporation. Whatever the relations between the two might otherwise be, the agency in March, 1911, of Adams to be served with process in litigation against the defendant in Kentucky can only be imagined. It was not proved.

We shall insert in the judgment our findings of fact.

We conclude that the motion to quash the Marshal's return on the subpoena issued on the bill of complaint should be sustained.

Except to that extent, the plea to the jurisdiction will not now be acted upon.

May 27, 1911.

Walter Evans,
Judge.

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And on August 23, 1911, the following proceedings were had:

And on July 17th, 1911, the following proceedings were had:

It is ordered that the following be spread at large upon the Minutes of the Court:

United States of America, Sixth Judicial Circuit, ss.

To the Hon. A. M. J. Cochran,

Judge of the District Court of the United States for the Eastern District of Kentucky:

Whereas, in my judgment, the public interest so requires, you are, pursuant to Section 596 of the Revised Statutes, hereby designated and appointed to hold the March Term of the Circuit and District Courts for the Western District of Kentucky, at the City of Louisville, in place or in aid of the proper District Judge of such District, and to discharge all the judicial duties of such Judge from the 17th day of July, 1911, to the 30th day of September, 1911.

Loyal E. Knappen,
Circuit Judge.

Grand Rapids, Mich., July 17, 1911.

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Circuit Court of the United States, Western District of Kentucky.

Herndon-Carter Company,
Complainant,

vs.

James N. Norris, Son & Company,
Defendant,

Order.

This day came complainant, Herndon-Carter Company, and filed herein its Petition for Appeal, accompanied by an Assignment of Errors, and an Appeal Bond in due form, with Robert Rutherford as surety thereon.

The Court being sufficiently advised, it is ordered that said petition be allowed, and that said bond, with the surety aforesaid, be, and it is hereby, approved.

Aug. 23, 1911.

A. M. J. Cochran,
Sitting by designation.

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The Petition for Appeal, Assignment of Errors and Appeal Bond above referred to are as follows:

Circuit Court of the United States, Western District of Kentucky.

Herndon-Carter Company,
Complainant,
vs.
James N. Norris, Son & Company,
Defendant,

Petition for Appeal.

The Herndon-Carter Company, complainant of the above entitled cause, conceiving itself aggrieved by the decree made and entered therein on May 27th, 1911, does hereby petition for an appeal from said decree to the United States Circuit Court of Appeals for the Sixth Circuit, and files herewith its Assignment of Errors relied upon.

Bruce & Bullitt,
Counsel for Complt.

The foregoing Petition for Appeal is hereby allowed this 23rd day of August, 1911.

A. M. J. Cochran,
Judge.
Sitting by designation.

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Circuit Court of the United States, Western District of Kentucky.

Herndon-Carter Company,
Complainant,
vs.
James N. Norris, Son & Company,
Defendant,

Assignment of Errors.

The complainant, Herndon-Carter Company, hereby assigns as errors committed by the Court in the above entitled cause, the following, to-wit:

1. The Court erred in holding that the defendant, James N. Norris, Son & Company, did not, in March, 1911, carry on business in Kentucky; and erred in holding that it did not, within five years preceding March, 1911, carry on business in said State.

2. The Court erred in holding that the cause of action stated in the Bill of Complaint arose in the State of New York.

3. The Court erred in holding that W. J. Adams, mentioned in the Marshal's return on the subpoena, was never an officer of said defendant Company.

4. The Court erred in holding that said W. J. Adams was not in March, 1911, and that he was not on March 10th, 1911, a manager or an agent of the defendant for any purpose; and erred in holding that he had not at that time, and especially on March 10th, 1911, authority from the defendant to act as its manager or agent; and erred in holding that he had not at that time, to-wit, in March, 1911, and especially on March 10th, 1911, authority to receive service for defendant of the subpoena issued upon the Bill of Complaint herein.

5. The Court erred in quashing, setting aside and holding for naught, the return by the said Marshal upon the subpoena herein, which return showed that it was executed upon defendant by delivering a true copy of said subpoena to W. J. Adams, as manager, chief agent and highest officer of defendant in the district wherein said cause was pending.

6. The Court erred in holding that it had not acquired jurisdiction to hear and determine the said cause.

7. The Court erred in dismissing the Bill of Complaint herein.

Bruce & Bullitt,
Counsel for Compl't.

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Circuit Court of the United States, District of Kentucky.

Herndon-Carter Company,
vs.
James N. Norris, Son & Company,

Know all men by these presents,

That we, Herndon-Carter Company, principal, and Robert Rutherford, surety, are held and firmly bound unto James N. Norris, Son & Company in the sum of One thousand Dollars, to be paid to the said James N. Norris, Son & Company, or executors or administrators or successors. To which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this 23rd day of August, A. D. 1911.

Whereas, The above named Herndon-Carter Company hath prosecuted an appeal to the United States Circuit Court of Appeals for the Sixth Circuit to reverse the decree rendered in the above entitled suit, by the Circuit Court of the United States for the District of Kentucky, at Louisville.

Now, therefore, the condition of this obligation is such, that if the above named Herndon-Carter Company shall prosecute its said appeal to effect, and answer all costs, if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

Herndon-Carter Co. (L. S.)
By Robt. Rutherford, Secy. (L. S.)
Robt. Rutherford, (L. S.)

Approved—Aug. 23rd, 1911.

A. M. J. Cochran,
U. S. District Judge, Eastern District of Kentucky, sitting by designation.

Robert Rutherford, being duly sworn, says he is the person who had signed the foregoing bond as surety of the Herndon-Carter Company; that he has unincumbered in this State subject to execution worth more than the sum of One Thousand ($1000.00) Dollars, and that he is worth more than the sum of One Thousand ($1000.00) Dollars over and above all of his debts.

(Seal) Robt. Rutherford.

State of Kentucky, County of Jefferson.

I, a Notary Public in and for the State and County aforesaid, do hereby certify that Robert Rutherford, whose name is signed as surety to the foregoing bond of the Herndon-Carter Company, this day acknowledged the said bond before me to be his act and deed; and, further, that he subscribed and swore before me to the foregoing affidavit as to his proper qualification as such surety.

Witness my signature, as Notary aforesaid, this August 22nd, 1911.

Com. expires Febry. 14, 1914.

Keith L. Bullitt,
N. P. Jeff. Co., Ky.

Western District of Kentucky, ss.

I, A. G. Ronald, Clerk of the Circuit Court of the United States for the Western District of Kentucky, at Louisville, do hereby certify that the foregoing 91 pages contain a true and correct copy of the record and proceedings in the case of The Herndon-Carter Company against James N. Norris, Son & Company, No. 7277, as

the same appears from the files and records in my said office.

Witness my hand and seal of said Court, this 8th day of September, A. D. 1911.

(Seal) A. G. Ronald, Clerk,
By Henry F. Cassin, D. C.

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United States of America, Western District of Kentucky, Sixth Judicial Circuit, ss.

To James N. Norris, Son & Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said Circuit, on the 20th day of September, next, pursuant to an appeal allowed by the Circuit Court of the United States for the Western District of Kentucky, wherein Herndon-Carter Company is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Edward D. White, Chief Justice of the United States, this 23rd day of August, in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States of America the one hundred and 36.

(L. S.) A. M. J. Cochran,
U. S. District Judge, Eastern District of Kentucky sitting by designation.

Upon which the Marshal made the following return:

"Received the within Citation and one copy at Louisville, Ky., on the 8th day of September, 1911, and executed same at Louisville, Ky., on the 9th day of September, 1911, on the within named James N. Norris, Son & Company, by delivering a true copy hereof to Burton Vance, Attorney for said James N. Norris, Son & Company.

This 9th day of September, 1911.

G. W. Long, U. S. Marshal,
By Lewis Ryans, Dpty. U. S. M."

And on December 20th, 1911, the following proceedings were had:

HERNDON-CARTER COMPANY, Complainant,
vs.
JAMES N. NORRIS, SON & COMPANY, Defendant.

This day came the complainant by Helm Bruce, its counsel, and filed a certified copy of order of the United States Circuit Court of Appeals dismissing its appeal therein, which is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

No. 2219.

HERNDON-CARTER COMPANY, Appellant,
vs.
JAMES N. NORRIS, SON & COMPANY, Appellee.

*Order.*

This day came appellant, Herndon-Carter Company, by Helm Bruce, counsel, and filed herein notice to appellee, duly accepted by its counsel, to the effect that the appellant would on this day move the Court to dismiss the appeal herein; and thereupon appellant did move to dismiss the appeal herein, and it is now ordered that said appeal be, and it is hereby, dismissed.

United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of order dismissing the appeal entered December 5th, 1911, in the case of Herndon-Carter Company, Appellant, vs. James N. Norris, Son & Company, Appellee, No. 2219, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 19th day of December, A. D. 1911.

[SEAL.] FRANK O. LOVELAND,
*Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.*

Came again the complainant, Herndon-Carter Company, and filed herein its Petition for Appeal, accompanied by an Assignment of Errors and an Appeal Bond in due form, with Robert Rutherford as surety thereon.

The Court being sufficiently advised, it is ordered that said

Petition be allowed, and that said bond, with the surety aforesa
be, and it is hereby, approved.

The Petition for Appeal, Assignment of Errors and Appeal Bo
above referred to are as follows:

Circuit Court of the United States, Western District of Kentuc

HERNDON-CARTER COMPANY, Complainant,
vs.
JAMES N. NORRIS, SON & COMPANY, Defendant.

*Petition for Appeal.*

The Herndon-Carter Company, conceiving itself to be aggriev
by the decree made and entered by the Circuit Court on May
1911, in the cause wherein said Herndon-Carter Company is co
plainant and James N. Norris, Son & Company defendant,
which decree said cause was dismissed solely for want of jurisd
tion in the Circuit Court, as appears by said decree, does here
petition for an appeal from said decree dismissing the cause for wa
of jurisdiction to the Supreme Court of the United States, and fi
herewith its Assignment of Errors relied upon.

HELM BRUCE,
*Attorney for Complainant.*

Circuit Court of the United States, Western District of Kentuc

HERNDON-CARTER COMPANY, Complainant,
vs.
JAMES N. NORRIS, SON & COMPANY, Defendant.

*Assignment of Errors.*

The complainant, Herndon-Carter Company, hereby assigns
errors committed by the Court in the above entitled cause the f
lowing, to-wit:

1. The Court erred in dismissing the bill of complaint here
for want of jurisdiction.

2. The Court erred in holding that it had not acquired jurisd
tion to hear and determine the said cause.

3. The Court erred in quashing, setting aside and holding f
naught the return by the Marshal upon the subpœna herein, whi
return showed that it was executed upon defendant by delivering
true copy of said subpœna to W. J. Adams as manager, chief age
and highest officer of defendant in the district wherein said cau
was pending.

4. The Court erred in holding that W. J. Adams was not
March, 1911, and that he was not on March 10, 1911, a manager
an agent of the defendant for any purpose; and erred in holding th
he had not at that time, and especially on March 10, 1911, authori

from the defendant to act as its manager or agent; and erred in holding that he had not at that time, to-wit, in March, 1911, and especially on March 10, 1911, authority to receive service for defendant of the subpœna issued upon the bill of complaint herein.

5. The Court erred in holding that the W. J. Adams mentioned in the Marshal's return on said subpœna was never an officer of the defendant Company.

6. The Court erred in holding that the defendant, James N. Norris, Son & Company, did not, in March, 1911, carry on business in Kentucky.

Wherefore, said Herndon-Carter Company prays that the decree in said cause, dismissing it for want of jurisdiction, be reversed.

BRUCE & BULLITT,
*Attorneys for Complainant.*

Circuit Court of the United States, Western District of Kentucky.

HERNDON-CARTER COMPANY
vs.
JAMES N. NORRIS, SON & COMPANY.

Know all men by these presents, That we, Herndon-Carter Company, Principal, and Robert Rutherford, surety, are held and firmly bound unto James N. Norris, Son & Company in the sum of One Thousand Dollars, to be paid to the said James N. Norris, Son & Company, executors or administrators. To which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this 20th day of December, A. D. 1911.

Whereas, The above named Herndon-Carter Company hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendred in the above entitled suit, by the Circuit Court of the United States for the Western District of Kentucky, at Louisville.

Now, therefore, the condition of this obligation is such, that if the above named shall prosecute its said appeal to effect, and answer all costs, if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

HERNDON-CARTER COMPANY. [L. S.]
By HELM BRUCE, *Att'y.* [L. S.]
ROBT. RUTHERFORD. [L. S.]
——— ———. [L. S.]

Sealed and delivered in presence of
HENRY F. CASSIN,
*Deputy Clerk U. S. Courts.*

Approved December 20th, 1911.

WALTER EVANS, *Judge.*

WESTERN DISTRICT OF KENTUCKY, *ss:*

I, A. G. Ronald, Clerk of the Circuit Court of the United States for the Western District of Kentucky, at Louisville, do hereby certify that the foregoing 76 pages contain a true and correct copy of the record and proceedings in the case of The Herndon-Carter Company against James N. Norris, Son & Company, No. 7277, as the same appears from the files and records in my said office.

Witness my hand and seal of said Court, this 27th day of December, A. D. 1911.

[Seal 6th Circuit Court, Wes. Dist. Ky., U. S. of America.]

A. G. RONALD, *Clerk,*
By HENRY F. CASSIN, *D. C.*

UNITED STATES OF AMERICA,
*Western District of Kentucky,*
*Sixth Judicial Circuit, ss:*

To James N. Norris, Son & Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington, D. C., on the* 18th day of January next, pursuant to an appeal allowed by the Circuit Court of the United States for the Western District of Kentucky, wherein Herndon-Carter Company is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 20th day of December in the year of our Lord one thousand nine hundred and Eleven, and of the Independence of the United States of America the one hundred and thirty sixth.

[Seal 6th Circuit Court, Wes. Dist. Ky., U. S. of America.]

WALTER EVANS, *Judge.*

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*Not exceeding 30 days from the day of signing.

Received the within citation and one copy at Louisville, Ky. on the 27th day of December 1911, and executed same at Louisville, Ky. on the 27th day of December 1911, on the within named James N. Norris, Son & Company by delivering a true copy hereof to Burton Vance, Attorney for said James N. Norris, Son & Company.

This 27th. day of December, 1911.

G. W. LONG,
*U. S. Marshal,*
By LEWIS RYANS,
*Deputy U. S. Marshal.*

| | |
|---|---|
| Fees of Marshal..... | $2.00 |
| Expense ..... | .10 |
| | $2.10 |

[Endorsed:] 7277. 3774/E.–301. Herndon-Carter Company vs. James N. Norris Son & Co. Citation & Copy. Bruce & Bullitt, Attorneys.

Endorsed on cover: File No. 22,999. W. Kentucky C. C. U. S. Term No. 923. Herndon-Carter Company, appellant, vs. James N. Norris, Son & Company. Filed January 8th, 1912. File No. 22,999.

12

No. 923.



# SUPREME COURT OF THE UNITED STATES

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HERNDON-CARTER COMPANY, - - - *Appellant,*

*versus*

JAMES N. NORRIS, SON & COMPANY, - - *Appellee.*

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## BRIEF FOR APPELLANT.

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HELM BRUCE,
*Attorney for Appellant.*

March 4, 1912.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

No. 923.

# SUPREME COURT OF THE UNITED STATES

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HERNDON-CARTER COMPANY, - - - - - - - *Appellant,*

*versus*

JAMES N. NORRIS, SON & COMPANY, - - - - - *Appellee.*

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MOTION.

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Appellant in the above entitled cause moves the court to advance and hear the same under rule 32 of this court; because the only question in issue is the question of the jurisdiction of the court below. And appellant files herewith a notice to counsel for appellee that the above motion would be made on this day, with proof of service of said notice and of the copy of appellant's brief, upon counsel for the appellee.

HELM BRUCE,
*Counsel for Appellant.*

# SUPREME COURT OF THE UNITED STATES

HERNDON-CARTER COMPANY, - - - - *Appellant,*

*vs.* BRIEF FOR APPELLANT.

JAMES N. NORRIS, SON & COMPANY, - - - *Appellee.*

## STATEMENT.

Present appellant, the Herndon-Carter Company, a Kentucky corporation, filed its bill of complaint in the United States Circuit Court for the Western District of Kentucky against the present appellee, James N. Norris, Son & Company, alleging that the defendant was a New York corporation, and proceeding then to state the facts of certain numerous transactions between complainant, a shipper of poultry, and defendant as a commission merchant, on account of which complainant insisted that defendant had not made a fair accounting to complainant on the transactions between them, and concluding with the prayer that a correct accounting be had and defendant required to pay whatever should be found justly due complainant. A full statement of the cause of action is not necessary to be here made, on account of the course of proceedings in the circuit court, as will presently appear.

It was alleged in the bill that defendant was a New York corporation, but that it was doing business both in New York and in Kentucky. Upon the filing of the bill a subpoena was issued against defendant and was returned by the Marshal as follows:

> "Received the within subpoena in chancery and one copy at Louisville, Ky., on the 9th day of March, 1911, and executed same at Louisville, Ky., on the 10th day of March, 1911, on the within named James N. Norris, Son & Company by delivering a true copy hereof to W. J. Adams, manager and chief agent and the highest officer of said company found in my district.
>
> "This 10th day of March, 1911.
>
> "G. W. Long, U. S. Marshal,
>
> "By Lewis Ryans, Dpty. U. S. M."

(Rec. 7.)

After the return of this process, the defendant entered a special appearance for the purpose of objecting and pleading to the jurisdiction of the court and filed what is called "its objection, and plea to the jurisdiction herein," which was in the following terms:

> "The Herndon-Carter Company,
>
> Plaintiff,
>
> v.
>
> Jas. N. Norris, Son & Company,
>
> Defendant,
>
> Special Appearance, Objection and Plea to the Jurisdiction.
>
> "Now comes the defendant by James R. Duffin and Burton Vance, its counsel, for this purpose

only, and enters special and limited appearance herein for the single purpose of objecting and pleading to the jurisdiction of the court over it, and for no other purpose, and under its said special and limited appearance it states that it is a corporation organized and existing under and by virtue of the laws of the State of New York; that its chief place of business is in the city of New York in the State of New York, of which city and State it and all of its officers and stockholders are residents and inhabitants; that *it has not now, nor has it since December, 1904, had any place of business in the State of Kentucky;* that it is not now conducting, nor has it since December, 1904, conducted any business in the State of Kentucky; that *it has not now, nor has it since December, 1904, had an agent in the State of Kentucky;* that W. J. Adams upon whom the marshal of this court served the subpoena herein was not at the time of said service, to-wit, on the 10th day of March, 1911, is not now, and never has been since December, 1904, a manager or an officer or an agent or a representative or an employe of this defendant, or in any way connected with it; that *W. J. Adams was not on said 10th day of March, 1911, is not now, and has never been since December, 1904,* either manager or chief agent or highest, or any, officer, of defendant in this district or elsewhere; and that the return of the marshal upon said subpoena herein is untrue in fact and insufficient in law.

"Defendant says that for a little over two years *prior to the first day of January, 1905,* the said W. J. Adams was employed by it and acted as its agent in Kentucky, in the purchase and shipment to it of poultry and produce, but that at the end of the year 1904 he served his connection with defendant and ceased to be its agent for any purpose whatever, and on the first day of January, 1905, the said W. J. Adams, J. N. Norris and William H. Norris formed

a partnership to which the said W. J. Adams contributed one-half of the capital and said J. N. Norris and W. H. Norris each one-fourth, and that since said first day of January, 1905, the said partnership has conducted the business of buyers and shippers of poultry, butter and eggs in Louisville and other parts of Kentucky, and that this defendant has not now, and never has had, any interest in said firm and said firm and none of its partners has ever been the agent of the defendant for any purpose whatsoever in the State of Kentucky; and that the only business transactions it has had with said partnership since the first day of January, 1905, consisted in business relations with said firm under which the said firm consigned to defendant on commission poultry and eggs which it sold for it on the eastern market and charged it a commission of 5 per cent in exactly the same way that it did the plaintiff in this action.

"The defendant says that it has the legal right, and privilege, which it now and shall ever claim, to be sued in the district whereof it is a resident and inhabitant, which is, as aforesaid, the Southern District of New York.

"By reason of the premises, this defendant says this court acquired no jurisdiction over it by virtue of the service of said subpoena upon the said W. J. Adams, as appears by the return of the marshal on said subpoena.

"Wherefore, it objects to this court exercising jurisdiction over it in this action, and moves that the said return upon said subpoena be quashed and held for naught.

"James R. Duffin,
"Burton Vance,
(Rec. 8.) Attys. for Deft."

Defendant also filed the affidavits of James N. Norris, William H. Norris and W. J. Adams in "support of

its objection and plea to the jurisdiction of the court over it herein" (Rec. 10).

Complainant filed a replication to this plea to the jurisdiction (Rec. 13); whereupon the case came on for trial before the court, and by consent it was ordered that the affidavits of James N. Norris and William H. Norris be read as depositions, and leave was given to the parties to introduce oral testimony before the court on the hearing of the issues as to the jurisdiction of the court; it being further ordered that stenographic notes of the testimony be taken by a reporter, designated for that purpose, that these notes should be transcribed and the transcript filed as part of the record; and that in the event of an appeal from the judgment, this transcript should be copied into the record on appeal; all of which was afterwards done, as shown by the order of submission (Rec. 14). This proceeding was in accordance with what we understand to be the proper practice, where oral testimony is heard before the court (2 Street's Equity, Section 1627).

After hearing the evidence and taking the matter under consideration, the court delivered a written opinion in which it stated that defendant was not doing business in Kentucky at the time this process was served, and that Adams was not its agent for the receipt of process (Rec. 62). Accordingly the court quashed and set aside the return of the marshal on the subpoena; whereupon complainant, by counsel, stated to the court that it could not otherwise secure service of subpoena upon the defendant; and thereupon the court, being of opinion

that it had not acquired jurisdiction, decreed the dismissal of the bill. The language of the decree being:

> "And the court being of opinion that it had not acquired and had not jurisdiction to hear and determine the cause, it is now ordered, adjudged and decreed that this cause be and it is dismissed for want of jurisdiction. Such dismissal, for similar reasons, must be without cost to either party." (Rec. 61.)

An appeal was first taken to the Circuit Court of Appeals; but attention of counsel being called to the cases of United States v. Jahn, 155 U. S. 109; Stephen v. Adams, 168 U. S. 618, and Remington v. Central Pacific R. Co., 198 U. S. 95, to the effect that the appeal must be taken direct to the Supreme Court, as being a case involving solely the jurisdiction of the circuit court, where the bill is dismissed on the ground that the court never acquired jurisdiction over defendant by valid service of process, the appeal in the Circuit Court of Appeals was dismissed on motion of appellant and thereupon a petition for appeal to this court from the decree dismissing the cause for want of jurisdiction was allowed.

There was no formal certificate certifying the question of jurisdiction; but the decree on its face shows that the cause was dismissed solely for want of jurisdiction (Rec. 61) and the petition for the appeal, which was allowed by the court, prays for the appeal solely on the ground that the bill was dismissed for want of jurisdiction (Rec. 71, 72). And this has been held to be sufficient. (Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S. 282).

## ASSIGNMENT OF ERRORS.

The formal assignment of erros is found in the record, beginning at page 72, but the substance thereof is that the court erred in holding that the defendant, James N. Norris, Son & Company, was not, in March, 1911, carrying on business in Kentucky, and erred in holding that W. J. Adams was not a manager or agent for the defendant company, nor one upon whom process against it could be served at the time of the service upon him; and erred in dismissing the bill for want of jurisdiction.

## ARGUMENT.

While it is true that the affidavits of James N. Norris, the president of defendant,, and William H. Norris, its secretary, which were prepared and sworn to in New York and which were read as depositions on the hearing, do say that the defendant corporation has not done business in Kentucky *since January 1, 1905,* and that W. J. Adams has not, *since January 1, 1905,* been an officer or agent of the defendant company, nor authorized to receive service of process against it; and while it is further true that the said W. J. Adams, on his direct examination, at the trial testified to the same effect; yet from other evidence introduced at the trial, including admissions by the defendant itself in the form of letters and proceedings taken and pleadings filed in the State courts in Kentucky, *long since 1905,* as well as by other facts presently to be mentioned, it is made perfectly clear that the claim of the defendant is not in fact true.

It will be remembered from the plea to the jurisdiction heretofore quoted that defendant's statement is that it as a corporation was doing business in Kentucky *up to January 1, 1905*, and that Adams was its agent in Kentucky up to that date; but that on January 1, 1905, a partnership was formed by James N. Norris, William H. Norris and W. J. Adams, and that since that date *the corporation* has done no business in Kentucky, although *this partnership* has done business (Rec. 8). It further appears from the testimony of W. J. Adams at the trial that no articles of partnership were ever drawn up (Rec. 39); that the alleged partnership has "exactly the same name as the New York corporation" and that the three partners in this alleged partnership under the name of James N. Norris, Son & Company are James N. Norris, president of the New York corporation, William H. Norris, secretary and treasurer of the New York corporation, and W. J. Adams, manager of the New York corporation (Rec. 40). Furthermore, although Adams swore that when the New York corporation ceased to do business in Kentucky and the partnership began, he "told everybody," yet he admits that no publication of this fact was ever made (Rec. 40).

It may be, as said by the circuit court in its opinion, that these are only facts which "might excite suspicion"; but complainant by no means rested upon bringing out these facts. It produced written evidence of various kinds, emanating from the defendant itself, in its corporate capacity, letters written by the defendant, pleadings by the defendant, and sworn statements made by this

man Adams as agent of the defendant, all of which show conclusively that this concern has been doing business since January 1, 1905, just as it did before. It is true, and it was necessarily true, that these various pieces of evidence do not refer to the particular date upon which the subpoena in this case was served, to-wit: March 10, 1911; but complainant covered that point by asking the witness Adams, if the relations between the New York corporation and the concern doing business in Kentucky, under the exact name of the New York corporation, *are the same now as during the years 1906, 1907 and 1908, being the periods to which these various pieces of evidence refer,* and by asking him *if his own relations to the New York corporation are the same now as they were throughout the years 1906, 1907 and 1908, to which the evidence just mentioned refers;* to all of which *he answered in the affirmative* (Rec. 58, 59)—in other words, if it be true, as we will presently show, that the evidence establishes beyond question, that *subsequent to January 1, 1905,* and in the years 1906, 1907 and 1908, the New York corporation was still doing business in Kentucky, and that Adams was still its managing agent in Kentucky, then *this same condition of facts exists to-day,* and *existed on March 10, 1911, when the subpoena was served in this case.*

This testimony showing the *continuance* of these relations to the present time was wholly disregarded by the circuit court in its opinion, when it referred to the written evidence introduced by complainant as coming from "a period too remote" (Rec. 64, 65).

Let us see now what complainant actually proved from the writings and records emanating from this New York corporation at dates long subsequent to January 1, 1905, when, according to its claim, it ceased to do business in Kentucky.

We will first refer to certain records of litigation in the courts of the State in which this defendant has several times admitted, since 1905, that it is a corporation doing business in Kentucky.

The most important of these records is that found in the case of Leitchfield Deposit Bank v. James N. Norris, Son & Company, No. 48070, in the Jefferson Circuit Court of Kentucky. It is somewhat unfortunate, so far as clearness is concerned, that the different parts of this record are separated from each other in the present record, owing to the fact that parts of it were introduced on cross-examination of the witness Adams, being papers that he had sworn to as agent of the defendant, and parts of the record were introduced as original testimony by the complainant; the court having ruled that the entire record could not be introduced on the cross-examination of Adams, but that we could only introduce the parts he had sworn to. The petition in this case of the Leitchfield Deposit Bank v. James N. Norris, Son & Company is found in the present record at page 50, from which it appears that the Leitchfield Bank alleged that the defendant, James N. Norris, Son & Company was "corporation created and existing by virtue of the laws of the State of *New Jersey*" and further alleged that on *June 25, 1907*, the defendant addressed and delivered to plain-

tiff (the bank) a letter, whereby it agreed to honor all drafts drawn on James N. Norris, Son & Company by one Royalty; and the plaintiff accepted this guaranty and on the faith of it paid certain drafts; but that subsequently the drafts were dishonored, and therefore the bank prayed judgment against the defendant, James N. Norris, Son & Company, for the amount of the drafts (Rec. 50). To this petition the defendant, James N. Norris, Son & Company, answered, its answer being signed by James R. Duffin, as its attorney, he being one of its attorneys in the case at bar. In that answer it denies that it is a corporation organized under the laws of New Jersey and "says that it was created, organized and now exists as a corporation under and by virtue of the State of *New York.*" And then, proceeding in the answer: "Defendant *admits that it executed and delivered to the plaintiff* the letter attached to plaintiff's petition as a part thereof marked 'Exhibit A.'" And the answer then proceeds to deny knowledge or information sufficient to form a belief as to whether the drafts had been presented or paid, etc. (Rec. 52). The pertinent fact however, in the present matter is that the defendant, sued in Kentucky as a corporation, improperly said to be of New Jersey, admits in this answer that it is a corporation, though of New York, and admits the execution by *it, a* New York corporation, of the letter, dated *June 25, 1907,* to which we will presently refer and which the court will see was a letter written *from Louisville* by this very man Adams, who *in his present testimony* says that at that time the New York corporation

was *not doing business in Louisville* and that *he had no connection with it.*

The letter of June 25, 1907, is filed as an exhibit with the petition in that case (Rec. 20) and by examining it the court will see that it is a letter dated June 25, 1907, written from Louisville, Ky., signed "James N. Norris, Son & Company (by) *W. J. Adams, Mgr.,*" addressed to the Leitchfield Deposit Bank, Leitchfield, Ky., and makes the guaranty set forth in the petition in that action (Rec. 20). It is true that in the course of that letter, Adams uses the expression: "I will say that our firm has been doing business with Mr. Royalty," etc. And the circuit court seemed to attach a great deal of importance to the use of the words "our firm." But this is completely met by the answer to which we have referred, which was filed *by the corporation,* expressly admitting that that letter was written by *it,* the New York corporation, and defending the action, not on the ground that it had never written that letter, but on the ground that it knew nothing of the presentation or payment of the drafts.

But this is not all the evidence furnished by that record. It became necessary at one time to file an affidavit for continuance; and Adams made the affidavit on April 17, 1908; and here is what he said:

> "That the defendant, James N. Norris, Son & Company, *is a corporation* organized and existing under the laws of the State of *New York,* and that this deponent *is the manager of the Louisville office of said corporation.* That Emmet Royalty, C. Roy-

> alty and are all witnesses whose testimony is of great importance," etc (Rec. 19.)

In other words, Adams, on *April 17, 1908*, swore that he was then the manager of the Louisville office of this defendant, a New York corporation. And the corporation filed that affidavit, and on the strength of it got a continuance of the case.

But this is not all the evidence yet. A few days later, after the filing of this affidavit for continuance, defendant filed an amended answer, an answer which was verified by this same W. J. Adams on April 23, 1908, in which he said:

> "W. J. Adams, being duly sworn, says that *he is the local manager of James N. Norris, Son & Company*, and that the statements contained in the foregoing amended answer and denials therein, are true, as he verily believes" (Rec. 20).

In other words, here again this same man on the *23d of April, 1908*, again swears that he is then the local manager of this New York corporation.

But this is still not all the evidence produced by that record. The defendant in that case, being the defendant in this case, took the deposition of a witness named Buftin, which it filed in that case in the preparation of its defense, and in the course of which deposition Buftin was asked by counsel for the defendant what his business was at that time, and in which he says he is manager for James N. Norris, Son & Company, residing at Bryan, Ohio; but that from April 1, 1907, to December

26, 1907, he had lived at Louisville, Ky., being employed by James N. Norris, Son & Company; and then, being asked what relation, if any, W. J. Adams then had with that company, he says: "*Manager of the Louisville district*" (Rec. 48). In other words, the defendant in that case, as constituting a part of its defense, filed in court the deposition of one of its managers (then residing at Bryan, Ohio), and had him swear that at that time W. J. Adams was the manager, for the Louisville district, of the defendant in that case, which was a New York corporation, and is the same as the defendant in the case at bar.

It seems to me that this testimony alone, even if there were nothing else in the record, is absolutely conclusive, when taken in connection with the testimony of Adams that the relations between the New York corporation and the Louisville house and between the New York corporation and himself are the same to-day, and were the same on March 10, 1911, when the subpoena herein was served, as they were in 1907 and 1908, the period of the transactions involved in the record in the case of Leitchfield Deposit Bank v. James N. Norris, Son & Company. Here in a concern sued as a corporation, on a letter signed in the name of the corporation by W. J. Adams as its manager, a business letter written from the Louisville house in June, 1907, which comes into court and expressly admits that it, the corporation, executed and delivered that letter; and then it files an affidavit for continuance made by this very man Adams to the effect that he is then, April, 1908, the "Manager of the Louisville

office of said corporation"; and files an amended answer, in which this same man again swears that he is the local manager of the corporation; and files the deposition of still a different part, a party who was then its manager at Bryan, Ohio, saying that this same man Adams is the "Manager of the Louisville district" of the corporation. If the facts there sworn to, and stated of record by this defendant in 1907 and 1908, were true, and if it is true, as Adams testified in the present case, that the same relations which existed between the New York corporation and the Louisville house in 1907 and 1908, and between the New York corporation and himself in 1907 and 1908, still continued to exist at the time this process was served in the present case, then it is necessarily true that when that process was served this New York corporation was doing business through its house in Louisville, and that W. J. Adams was the manager of the Louisville house for the New York corporation.

But the suit by the Leitchfield Deposit Bank was not the only litigation that this corporation has had in the courts of Kentucky since January 1, 1905. We have what are known as "revenue agents" in Kentucky, who go after people for taxes they have forgotten to pay. One of these revenue agents filed a suit against James N. Norris, Son & Company, *incorporated,* on July 19, 1905, which the court will observe was subsequent to January 1, 1905, in which the Commonwealth, through the revenue agent, said that the defendant was a corporation; that it was subject to taxation by the Com-

monwealth of Kentucky, but had failed to properly list its property for taxation (Rec. 54).

To this the defendant corporation filed an answer, which was verified by this same W. J. Adams on *December 12, 1905,* in which, while denying the allegations of omissions of property, it does not deny that it is a corporation, though under the code of Practice of Kentucky every material allegation of a pleading is taken as true, unless specifically traversed, except (1) allegations against a person under disability, or (2) constructively summoned, or (3) allegations of value or damage (Civil Code, Sec. 126), and in the verification by Adams of the answer; he says:

> "W. J. Adams says that he *is now,* and at all times mentioned herein was, *the agent of the defendant in Kentucky and had sole charge of their business in Jefferson County,* and that the statements contained in the foregoing answer are true as he verily believes." (Rec. 57.)

But this is still not all the litigation in which this corporation has figured. The corporation itself brought a suit in a magistrate's court on July 21, 1910, against L. Jacobson and Jennie Jacobson as the Home Bakery. It is true plaintiff is not specifically stated to be a corporation, but although the *individual defendants* constituting the partnership doing business under the name of "Home Bakery" are named and sued, yet *no individual names of plaintiffs* are given— it does not appear to be a suit by James N. Norris, William H. Norris and W. J. Adams, as James N. Norris, Son & Company, but it is

a suit by James N. Norris, Son & Company against L. Jacobson and Jennie Jacobson, as Home Bakery (Rec. 58.)

In that case, plaintiff, as part of its evidence, introduced certain dray tickets, which were admitted to have been issued by itself and to have been used as evidence in that case, and each of which dray tickets is on a printed form which shows that it is the ticket of James N. Norris, Son & Company, 135 E. Jefferson Street, Louisville, Ky., and that James N. Norris is *President,* and William H. Norris, *Vice-President* and Treasurer, and W. J. Adams, *Manager;* these several tickets that were used in that case being dated respectfully November 20, 1908, January 1, 1909, and January 4, 1909 (the date of one being blank (Rec. 23, 24).

But the records made in these litigations are not all of the evidence heard on the trial of the case at bar. We have a number of *letters* admitted to have been written by the defendant, the New York corporation, to the complainant in this very case, from which it distinctly appears that the New York corporation is doing business in Louisville through what it calls its "*Louisville house,*" and that *W. J. Adams is its manager.* Each of the letters, to which we will presently refer, has the same letter-head, as is shown by the statement of the reporter in the transcript of evidence, although for purpose of brevity the letter-heads are omitted from all of them, except the first letter. These letter-heads, on which these various letters to the complainant were written, show the corporation has houses at New York, Kansas City, Mo.,

Knightstown, Ind., *Louisville, Ky.,* and Bryan, Ohio (Rec. 41). All the letters are signed by James N. Norris, Son & Company. And Mr. Carter, president of the complainant corporation, testifies that they were all received by him in due course from James N. Norris, Son & Company *of New York* (Rec. 41).

The first letter in point of time is a letter written on *July 13, 1907.* The first two paragraphs (which are the only relevant portions) are as follows:

"Messrs: Herndon-Carter Company,
Louisville, Ky.

"Gentlemen:

"Enclosed find sales for car and half of poultry received this week, which we hope will prove satisfactory. The feed charges on part car we estimated here. *Mr. Adams advised us that he supplied the feed for car,* and as he neglected to give us the amount, we pro-rated it on feed basis of former cars; however, should this amount be wrong, *Mr. Adams will settle the difference with you down there.*

"We received a check for $523.87 from you, which we presume must have been intended *for our Louisville house,* so have forwarded the same to them." (Rec. 41.)

Thus it will be seen that the defendant, the New York corporation, on July 13, 1907, in speaking of a shipment of a car and a half of poultry, which it had just received from the Herndon-Carter Company, says it had been advised that Mr. Adams, the same Adams who has heretofore figured in this testimony, "supplied the feed for car," on account of which the defendant is taking credit. And then the letter further advises that if there is any question about the amount "Mr. Adams will settle the dif-

ference with you down there," thus showing plainly that Adams was acting for this New York corporation in this business of July 13, 1907. And then the letter further contains the statement, as to a certain check which Herndon-Carter Company had sent defendant, that this must have been intended "for our Louisville house," and that it is being forwarded to them. The court will see presently, from other letters hereafter referred to, that Adams had an interest, evidently as part of his compensation, in the profits made by this Louisville branch, which is by no means an unsual arrangement; and it was therefore important and proper that all business properly belonging to the Louisville house should go through it. It is altogether likely that the defendant corporation had this arrangement with each of its different managers of its different houses shown on its letter-head in Missouri, Indiana, Ohio and Kentucky, to-wit: that each manager, as part of his compensation, was allowed a certain part of the profits on the business originating in his particular house.

The next letter is one of *August 24, 1908.* The relevant portion of that is at the beginning of the letter, where it is stated:

"Herndon-Carter Co.
Louisville, Ky.

"Gentlemen:

"Your favor received and fully noted. In regards to wiring the outlook, we aim to wire just what we think and not willingly mislead anybody. In looking over our telegrams, we find that we wired *you* exactly the same as we wired *our own houses.* It is

almost impossible to predict the outlook this time of year," etc. (Rec. 42.)

Here again we find this defendant, the New York corporation, stating in effect that these different houses, located as shown by its letter-heads, are its "own houses"; and explaining to Herndon-Carter Company that they had no just ground for complaint, because the information given them as to the state of the market was exactly the same as given to the defendant's "own house."

The next letter is one of *March 8, 1909.* This letter again begins by responding to a complaint from the Herndon-Carter Company that defendant had not kept them properly posted as to the market. The second paragraph of that letter is the only one that has any relevancy here. It evidently refers to some trouble which Herndon-Carter had had with this same man Adams. And concerning this, the defendant corporation writes:

"In regard to Mr. Adams' high notions, it is pretty hard to keep him down, although he has not bought much stuff this last two weeks, and we can not understand how he could have bought it much cheaper than he did. He called us up on the phone and asked our advice about buying a car at 13c, and we told him to leave it alone, which he did. *We certainly don't care to lose money in Louisville, any more than we do in New York,* and would much rather the stock be evenly divided and make a dollar than get it all and work for glory." (Rec. 43.)

Here is a direct statement in effect that the company *is doing business in Louisville;* because the writer says

they do not care to "lose money in Louisville, any more than we do in New York." It is difficult to see how they could lose money in Louisville, if they were not doing business in Louisville, and the business referred to was evidently business conducted by Mr. Adams.

The next letter and the remaining one from which we shall quote is a letter of *July 7, 1909*, and it is a very important letter. It begins as follows:

> "The Herndon-Carter Company,
> Louisville, Ky.
> "Gentlemen:
> "I am just in receipt of your several letters in which you call attention to the unpleasantness you are having *with our house in Louisville.*
> "Now, I would like to make myself plain in this matter. As I have always stated to you and every one else, there is never any good in fighting, but, on the contrary, lots of money lost and harm done. *Our Mr. Adams, who runs our house in Louisville, has a certain interest in the profits, and it would be pretty hard for me to say that he shouldn't do this or that, which, in his judgment, curtails his profits.*" (Rec. 44.)

This letter, like all the other letters we have quoted, is signed James N. Norris, Son & Company, and shows that the relations between the New York corporation and their Louisville house and W. J. Adams, were just exactly what we have stated the facts to be, to-wit: That the Louisville house was a mere branch of the New York concern, and that W. J. Adams was the manager of this Louisville branch; and that, as a part of his compensation for his services, he was given a certain interest in

the profits. Note that this letter, written in 1909, does not say, as they would now have us believe has been true since 1905, that this Louisville house is *a partnership, entirely independent of us, a New York corporation,* and that Mr. Adams has contributed *half of the capital* of the partnership; but the statement simply is that Mr. Adams who runs *"our house"* in Louisville has *"a certain interest in the profits."* We do not see how anything could possibly be made any plainer than this is. And it is in exact accord with the facts as shown by the court records in the State courts of Kentucky, to which we have already referred.

Counsel for defendant took pains to prove by Adams that this Louisville house, of which he was manager, did not confine its shipments to James N. Norris, Son & Company at New York, but that it also shipped to other concerns at other places (Rec. 36, 37). But the court will observe that all of the specific cases given of shipments to other places are of articles *other than poultry,* such as butter and feathers. And speaking of shipments to James N. Norris, Son & Company at New York, the witness says: "They got the greatest part of the live poultry." He does not in fact say that anybody else got any part of the live poultry. But there is nothing inconsistent between the statement that the Louisville house shipped certain articles, like butter, feathers, etc., to other concerns, and the statement that it was a mere branch of the New York concern. It would be altogether natural that a concern in the live poultry business, as James N. Norris, Son & Company were, would receive

shipments of such articles as butter, feathers, etc., directly connected with the poultry business; and if they chose to sell those articles to other concerns at other places, this would be perfectly legitimate, but it would by no means show that the Louisville house was not a branch of the New York concern. And that it was is shown beyond dispute, both by solemn court records, the facts in which are sworn to by this very man Adams, and by the letters of the defendant corporation itself, over its own signature.

We, therefore, respectfully submit that the judgment herein should be reversed with directions to overrule the plea to the jurisdiction and to set aside the order quashing the return on the subpoena.

HELM BRUCE,
*Attorney for Appellant.*

March 4, 1912.

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No. 923.

# Supreme Court of the United States

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HERNDON-CARTER COMPANY - - - - *Appellant*

*vs.*

JAS. N. NORRIS SON & COMPANY - - - *Appellee*

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## BRIEF FOR APPELLEE

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JOHN H. CHANDLER,
WILLIAM B. FLEMING,
*Attorneys for Appellee.*

MARCH 27, 1912

C. T. Dearing Printing Co., Louisville.

# Supreme Court of the United States

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HERNDON-CARTER COMPANY - - - - - - - - - - - -*Appellant,*

vs. **BRIEF FOR APPELLEE**

JAMES N. NORRIS, SON AND COMPANY - - - - - - - - *Appellee.*

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## POINTS AND ARGUMENT.

In advance of the argument on the question of the correctness of the dismissal of the case for want of jurisdiction for lack of proper service of process, certain preliminary questions arise to which the attention of the court is called.

### I.

1. HAS THIS COURT JURISDICTION OF THE APPEAL.

To give this court jurisdiction, Section 5, of the Act of 1891, requires that the question of jurisdiction shall be certified to the Supreme Court from the court below for decision.

No certificate was prayed for in the petition for appeal and none was made by the Circuit Court, unless the allowing of the appeal may be held to be such. Can this allowance be taken as a valid certificate?

Section 5, of the Judiciary Act of 1891 allows an ap-

peal direct to the Supreme Court in any case in which the jurisdiction of the court is in issue but provides that in such cases "the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." In *Maynard vs Hecht* 151 U. S. 324, this court holds that the intention of Congress *as to the manner of certification* is to be arrived at in the light of the rules thereto before prevailing as to certifying from the court below, and that the absence of such certificate cannot be helped out by resort to other papers. No such certificate was made herein.

It is true that the appeal here is from a judgment which shows on its face that the case was decided on the sole question of jurisdiction, but it is clear that there is no certificate such as was required under the rules prevailing at the time of the passage of the Judiciary Act of 1891, touching the matter of certification from the court below (*Maynard vs Hecht*)

Under the old law, not only was a special certificate required, but only questions of law could be certified. If any facts were necessary for the presentation of the legal question certified, these facts were found and were also certified and such findings were conclusive. In *Cross vs Evans* 167 U. S. 60 and in *Graver vs. Faurot,* 162 U. S. 435, it is held that the Judiciary Act of 1891, confers no power to certify the whole case, but only certain distinct questions of process, unmixed with questions of fact.

But this court has held in several cases that in the cer-

tification from the Circuit Court to the Supreme Court, it is not necessary to make a statement of facts, and it has also further relaxed the rule laid down in the earlier cases as to the necessity for a formal certificate. Nevertheless, it would seem that a certificate of the question of juridiction is necessary (*Courtley vs. Pradt* 196 U. S. 89, 91); and the forms of certificate given in the text books follow this rule. (See Loveland's Forms of Federal Practice, Nos. 1334 to 1336.) It was held in *Davis vs Geissler* 162 U. S. 290, that the question of jurisdiction was not sufficiently certified by an appeal showing that after the evidence was closed, the court decided to submit it to a jury and entered an order that "it appearing to the court that this court has no jurisdiction of the subject matter of this action, and it is ordered that this case be and the same is hereby dismissed at the cost of the plaintiff."

The case recited in brief of opposing counsel (185 U. S. 282) differs from the case at bar in this, that in the former the order allowing the appeal states that "the appeal was allowed from the final order and decree dismissing said suit for want of jurisdiction," while the allowance of the appeal in the latter contains no such statement.

In the case of *Courtney vs. Pradt,* 196 U. S. 89, this court held that while the rule in *Maynard vs. Hecht* has been somewhat relaxed, yet the record must show that *the court* below *sends up* for consideration a single and definite question of jurisdiction, and it further held that

the question of jurisdiction is one "of the court as a court of the United States."

There is nothing in the record here considered showing that the Circuit Court sent this case up. It allowed the appeal and that was all.

Moreover the question of jurisdiction involved is not a question of the court as a court of the United States, but of whether the defendant was properly cited.

If, however, the court shall consider that the form of the appeal is equivalent to a certificate and meets the requirements in this respect and that the question involved is a question "of the jurisdiction of the court as a court of the United States," we respectfully submit that the appeal is fatal for the reason that the certificate was not had at the term of the court in which the decree was rendered. The decree was rendered at the March term of the court and the petition upon which the appeal was granted was not filed until the following October term. The petition for the appeal to the Circuit Court of Appeals which was filed at the March term did not pray an appeal (as was done in the petition for appeal to this court) by reciting that "the cause was dismissed for want of jurisdiction in the Circuit Court." That the certificate must be issued at the same term of court at which the decree was rendered was decided in The Bayonne 159 U. S. 687; *Colvin vs. Jacksonville,* 158 U. S. 456; and *in re* Lehigh Min. and Mfg. Co., 156 U. S. 322. And this is the law as laid down in Loveland's App. Jur. of Federal Courts, Sec. 107, 108; and Bates Fed. Equity Procedure, Sec. 802.

2. Is the Appeal Taken From the Proper Decree?

In addition to the statement of the case made in the brief for appellant it should be noted that the Circuit Court filed a written opinion in the case in which it stated that it would insert in the judgment its findings of fact and sustain the motion to quash the Marshall's return on the subpoena issued, and that, except to that extent, the plea to the jurisdiction would not at that time be further acted upon; that it did accordingly make its findings of fact and decreed that the return upon the subpoena should be and the same is quashed, set aside and held for naught; and that it was only after the counsel came and stated to the court that it could not otherwise secure service of its subpoena upon the defendant and for that reason did not desire to make further effort to do so, and asked the court to render its judgment upon the plea to the jurisdiction that the judgment dismissing the case was entered.

The appeal is not taken from the decree quashing the Marshall's return, but from the decree dismissing the cause. These are two separate decrees. When the first decree was made, the complainant still had his right to have issued an *alias* subpoena and it was only after his election in open court not to apply for this *alias* and upon complainant's request for the final decree of dismissal that it was rendered. Now the first decree is not complained of here, and yet, if that decree stands, it follows that there is no error in the second decree, which is the one appealed from. The wrong, if any, done to com-

plainant is in the first decree and it has no right to complain of the second decree unless it is in a position to have the first decree set aside and it is not appealing from the first decree.

The only decree which under this appeal the court can reverse would seem to be the decree dismissing the cause, leaving the decree quashing the Marshall's return still standing. But so long as the former decree stands it would seem that the second decree must stand. In the *case of Kendall vs. Am. Automatic Loom. Co.*, 198 U. S. 477, the appeal was taken from the order quashing the Marshall's return and that was held to be good.

If the foregoing points be ruled against our contention, then it will be necessary to consider the action of the Circuit Court in setting aside the return on the subpoena made by the Marshall.

## II.

### Did the Circuit Court Acquire Jurisdiction of the Defendant?

The Circuit Court dismissed the action because the proof failed to show a valid service of the writ of subpoena.

The correctness of the decree quashing the Marshall's return on the subpoena turns upon the question whether or not W. J. Adams, upon whom it was served, was, on the 19th day of March, 1911, the managing agent of the appellee's business. In proof of its plea that he was not such agent, the defendant filed in the court below the affidavit of the president of the corporation and also

that of its vice-president and these affidavits were by stipulation read as depositions. This evidence is clear, direct and unequivocal, and is supported by the testimony of William J. Adams himself, who was examined as a witness. It is further supported by the testimony of Margaret Lyons, who was the bookkeeper for the copartnership which was doing business in Louisville, Kentucky. Thus it was shown that Adams was a member of a firm in Kentucky having the same firm name as the New York corporation and of which the chief officers of the New York corporation were members, but not the agent of appellee.

The proof affirmatively shows that the appellee, the New York corporation, did business with the Louisville firm and in its dealings with it recognized the firm as a separate and distinct entity (R 29 to 36).

The ultimate facts of this proof are further supported by much of the evidence adduced by the appellant. The complainant's contention is that the appellee as a corporation was doing business in Kentucky and to prove this it introduced a letter (R 21) written by W. J. Adams, Mgr., to the Leitchfield Deposit Bank, in which he describes the business being done as the business of the "firm." The complainant also introduced the record of the suit of the *"Commonwealth of Kentucky vs. James N. Norris Son & Company, Inc."* which shows (R 23) that the defendant had property in Kentucky as late as 1904; but *no evidence is introduced to show that it had property in Kentucky subsequent to* 1904. The fact that it is

made to appear that the defendant had property prior to 1905 and that it did not possess any property in Kentucky subsequent to that date, corroborates the contention of appellee that the New York corporation ceased to do business in Kentucky on January 1, 1905. The record introduced from the justice's court (R 58) does not show that the suit was brought by the New York corporation. Presumably it was brought by the partnership. The matter of the confusion in drayage tickets filed in that suit, is fully explained by Adams (R 26 to 29).

The deposition of C. F. Buftin filed in the case of *Leitchfield Deposit Bank vs. Jas. N. Norris Son & Co.*, is immaterial and incompetent.

It seems that after the Kentucky partnership was formed of which Adams was a member, he acted as "manager" of said partnership and this fact clears up to some extent the action of Adams in the suits instituted in the State Courts.

The proof tends to show looseness in the business methods of the parties and some confusion by the parties themselves of the partnership and corporation matters. This was not altogether unnatural.

The officers of the corporation were also members of the partnership. Adams had, at one time, acted as manager for the corporation. In matters wholly immaterial to this suit this led to some apparent confusion. For example, in writing to a friend, Jas. N. Norris, the president of the New York corporation, who was also a member of the firm in Louisville, spoke of the business in Louisville

as "our house." In the matter of suits brought against the corporation of which Adams had been manager in Kentucky, he seems to have assumed the authority to act for the corporation after his authority as "manager" had ceased. If the complainant in the court below had suffered any wrong by reason of any of this it may be that the principle of estoppel might be invoked and that it would be in a position to take advantage thereof. But it is not pretended that the appellant was ever misled by any of this conduct, nor that it ever had notice of any of the facts which it now parades until after it had instituted this suit. It does not claim to have been misled or injured by any of them. Surely they afford no just ground upon which to stand in appellant's effort to bring a New York corporation to Kentucky, to try out the issues between the parties. Complainant is a Kentucky corporation, having its place of business in Louisville, and defendant is a New York corporation having its plaec of business in New York City. It is not pretended that appellant ever did business with appellee in Kentucky.

The Kentucky Code of Civil Practice (See Section 51. Carroll's Code of Civil and Criminal Practice) provides:

"*Private corporation or railroad.* In an action against a private corporation the summons may be served, in any county, upon the defendant's chief officer, or agent, who may be found in this State; or it may be served in the county wherein the action is brought upon the defendant's chief officer or agent who may be found therein."

Sub-section 33 of Section 732 of the same code (See Carroll's Code of Civil and Criminal Practice).

"*Chief officer or agent of corporation.* The chief officers or agent of a corporation which has any of the officers or agents herein mentioned is: First, its president; second, its vice-president; third, its secretary or librarian; fourth, its cashier or treasurer; fifth, its clerk; sixth, its managing agent."

Section 571, of the Kentucky Statutes, Carroll 1903, provides as follows:

"*Agent upon whom process may be executed to be located in State — Penalty.* All corporations except foreign insurance companies formed under the laws of this or any other State, and carrying on any business in this State, shall at all times have one or more known places of business in this State, and an authorized agent or agents thereat, upon whom process can be served; and it shall not be lawful for any corporation to carry on any business in this State, until it shall have filed in the office of the Secretary of State a statement, signed by its president or secretary, giving the location of its office or offices in this State, and the name or names of its agent or agents thereat upon whom process can be served; and when any change is made in the location of its office or offices, or in its agent or agents, it shall at once file with the Secretary of State a statement of such change; and the former agent shall remain agent for the purpose of service until statement of appointment of the new agent is filed; and if any corporation fails to comply with the requirements of this section, such corporation and any agent or employe of such corporation who shall transact, carry on or conduct any business in this State for it, shall be severally guilty of a misdemeanor, and fined not less than one hundred nor more than one thousand dollars for each offense."

No such statement as that required by this statute was filed, because the defendant was not carrying on business in Kentucky, and the court will not presume that defendant committed a criminal offense.

To constitute a valid service of *mesne* process on a corporation of another State:

(1) The writ must be served within the jurisdiction upon its officer or managing agent.

(2) The company must, within the contemplation of the law, be doing business within the State. *St. Clair vs. Cox,* 106 U. S. 350; *in re Haborn,* 150 U. S. 653; *Penn. Lumber Co. vs. Meyer,* 197 U. S. 407; *Peterson vs. Ch., etc., R. R. Co.,* 205 U. S. 364, 388, 390; *Green vs. Chicago, etc., R. R. Co.,* 205 U. S. 350; *Celia Poman Co. vs. Bohlinger,* 147 Fed. 442.

If appellee was doing business in Kentucky after January 1, 1905, it ought to have been easy for appellant to prove the fact by direct proof. This has not been done. The only evidence adduced which could possibly be construed as at all tending to show that appellee ever did any business, or had any agent to conduct its business in Kentucky subsequent to 1904, is purely circumstantial or argumentative; and if it can be considered that there is even circumstantial evidence of this, it would seem that it cannot be held to extend the time of such conduct beyond July, 1909. To have a shadow of ground upon which to stand, it is therefore necessary to appellant's contention that the period from July, 1909, to March, 1911, be bridged over. This is attempted to be done by one single

thread. W. J. Adams was asked, (R 59) on cross examination, the following question:

"Q. Your relations to the New York corporation were the same on March 10, 1911, as they were throughout the years 1907 and 1908?"
"A. Yes, sir."

The meaning of this answer must be interpreted by what the witness had previously testified to as to those relations and that testimony is to be found in the Record at pages 16, 17 and 18. In this light it will be seen that instead of supporting the contention of appellant, the answer of the witness on page 59 is entitled to be considered as having the opposite effect from that assumed by the counsel for appellant in his brief.

In view of the whole of the evidence it would seem that the Circuit Court could have reached no other conclusions than those embodied in its findings of fact which are as follows:

> "First—That the defendant—shown by the bill to be a body corporate created and existing under the laws of the State of New York—did not at any time in March, 1911, nor at any time within any one of the five years immediately preceding that time, carry on business in the State of Kentucky.
>
> Second—That the cause of action alleged in the bill of complaint arose in the State of New York, and not in the State of Kentucky.
>
> Third—That W. J. Adams, who is mentioned in the return of the Marshall upon the subpoena herein, was never an officer of the defendant company; and

Fourth—That the said Adams was not at any time in March, 1911, a manager or an agent of the defendant for any purpose, and that he had not then any authority from the defendant to act as its manager or agent, nor in any manner to receive service for it or in its behalf of the subpoena issued upon the bill of complaint in this cause."

In addition to its finding of fact, the court filed a written opinion in the case which is so well considered and so convincing that we copy it in full into this brief. The opinion is as follows:

OPINION.

"The complainant corporation is a citizen of Kentucky. The defendant, another corporation, though a creation of the laws of New York, and a citizen of that State, having been sued here, has filed a plea to the jurisdiction and has moved the court to quash the return of the Marshall made upon the subpoena, whereby it was attempted to get the defendant before the court by service upon one W. J. Adams, stated in the Marshall's return to be agent for the defendant. Testimony was introduced in support of the plea and motion to quash, explicitly to the effect that Adams was not the defendants' agent for any purpose at the time the service was attempted to be made. This proof was made a prima facie case against the return which the complainant has sought to overcome by proof of a very wide range of isolated and disconnected circumstances, which, at various times, had occurred long before March, 1911, and by proof that Adams had made statements several years ago which showed him then to have been defendant's agent for certain purposes, but there was, at the hearing, no direct testimony that such agency was continued, nor that it existed in March last, nor, indeed that at that time the corporation defendant was carrying on business

in this State at all, though it is shown that a co-partnership exists here now, and has since January, 1905, with a name precisely the same as that of the defendant, and that two of the officers or stockholders of the corporation are partners in the firm. This partnership most probably was doing business in some respects in close relations with the defendant, but nevertheless the partnership and the corporation were in law and in fact different entities and an agency of one of the partners, for the corporation cannot fairly nor legitimately be inferred from mere dealings and business relations between the two in matters mercantile. Such business transactions or relations might be altogether independent of any relation of agency, and much of the testimony tends to show that such was the case. Nor did the transactions between complainant and defendant, out of which the alleged cause of action arose, take place in Kentucky, although the complainant doing business here shipped hence to the defendant in New York certain articles of merchandise to be sold on commission in the latter city by defendant, who did business there. The complainant alone dealt with the merchandise in Kentucky, while all that was done in respect to it by the defendant was done in New York. Ordinarily, as we have often held, a defendant has the right to be sued at home, and cannot be deprived of that advantage and be compelled to litigate elsewhere unless in some way he consents that there may be service upon him in another jurisdiction, or unless he voluntarily enters his appearance there, which has not been done in this instance. Corporations are entitled to the full benefit of this principle, and service of process upon them in foreign jurisdictions can only be lawful and binding when, directly or impliedly, they have consented that service upon them may be made by service upon some person whom they have authorized to receive it for them. Authorization is essential, though it may be proved by indirect as well as by direct testimony. In short, service upon a corporation can be sufficient only when it is made in its behalf upon one of its officers or agents, and if

upon the latter, he must in some way have authority to receive the same for and on behalf of the corporation. If a corporation does not carry on business in the State where it is sued, service made upon any officer or agent casually in that State is invalid. If a corporation, though a foreign one, does actually carry on business in the State where the suit is brought, service there upon an authorized agent may be sufficient, and especially in suits upon causes of action which arose there, and in such latter instances it may sometimes be presumed that a previous agency continues for the purpose of serving of process in suits upon causes of action so arising. To obviate or lessen difficulties growing out of uncertainty in such matters, Section 194, of the Kentucky Constitution requires all corporations doing business in this State to have authorized agents here upon whom service of process may be had. Section 571, of the Kentucky Statutes, enacted to carry Section 194, of the Constitution into effect, provides that evidence of such agencies shall be filed in the office of the Secretary of State. It may be important to note that nothing of this sort was done presumably because the defendant did not carry on business in this State within the meaning of its laws. Section 571, made it criminal to fail to do what it required, and we may not presume that the law was violated and a penal or criminal offense committed.

"Obviously the sole question involved in the motion to quash is, whether Adams was the defendants' agent to receive service in March, 1911. As we have seen, the direct and positive proof was to the contrary, and no direct or positive testimony showed him to be such. The testimony of complainant as to agency at any time related to periods several years before March, 1911, and to the special matters to which complainant's evidence referred. The complainant, averring that Adams was agent for the defendant in March, 1911, in such form as would authorize service upon him, and thus bring the defendant into court in a foreign jurisdiction, must establish the fact by such clear proof as should fairly satisfy the court of the

existence of such agency at the time the service is attempted. The fact cannot be presumed. It must be proved. The proof has not satisfied the court that the defendant has in fact carried on business in this State (within the meaning of the constitutional and statutory provisions to which we have referred) since January, 1905. It has, however, been shown that the defendant in New York received there business in its line from customers in Kentucky. But the defendant's part of that business was carried on in New York and not in Kentucky. There is no pretense that Adams is now, or that he ever was, an officer of the defendant. That he may at remote times have been, in some way and for certain specific purposes, an agent of the defendant, might be admitted. That he made statements to justify such an inference in respect to definite, but remote, transactions was clearly enough proved. But all these matters, which occurred years ago, do not show that at any time within the last several years Adams was clothed by the defendant with any agency or authority to receive notice on its behalf of the pendency of an action in court in such way as to bring the defendant before the court for judgment. Yet at last this is the sort of agency requisite to support a service of process. Like all other delegated authority it must depend upon the act or consent of the supposed principal. The facts and circumstances, gathered with most industrious care, offered to support the service, do not, in our opinion, do so, and besides relating to special matters only, are not sufficiently recent to show the sort of agency required for the present emergency. An inference that the requisite agency existed in March, 1911, would be drawn at very long range and supported more by ingenious argument than by substantial testimony. The light afforded by the testimony comes from a period too remote. It may possibly show what existed long ago, which is not very material, but not what exists now, which is especially so.

"The law applicable to the point in contest may be found in cases like *St. Clair vs. Cox*, 106 U. S. 350; *Peter-*

*son vs. Chicago, etc., R. R. Co.*, 205 U. S. 364, 388, 390; *Green vs. Chicago, etc., R. R. Co.*, 205 U. S. 350; *Celia Commission Co. vs. Bohlinger,* 147, Fed. 422.

"The complications in the premises grow, of course, out of the fact that the corporation defendant and the co-partnership referred to in the testimony have the same names, one concern being here, and the other in New York, but while that fact might excite suspicion, it does not of itself show that the defendant corporation authorized Adams to be its agent here for the receipt of service of process issued in suits brought against it in Kentucky, nor that it consented that process attempted to be served upon it in that way in Kentucky should bind it. Nor has any state of fact been shown which would authorize the inference that it was the defendant's duty at any time to notify the complainant of the change to or formation of the partnership in January, 1905. Complainant did not begin its transaction with the defendant until in December, 1906. It knew nothing of what had occurred in the suits and proceedings between other persons and the defendant alluded to in the testimony, and had no claim to be notified of the partnership formed in 1905, as a change from the corporate work in 1904. Therefore, nothing analogous to estoppel can operate.

"We by no means regard much of the testimony profered by the complainant as competent against the defendant, but have let it all in and have accorded all it any weight to which it could possibly be entitled. Nevertheless we have not been able to reach the conclusion that the sort of agency necessary to support the service on Adams existed in March, 1911. He was interested in the partnership here, but not in the corporation in New York. His firm dealt, among others, with the defendant corporation by sending to it merchandise to be disposed of on commission. But then, so did the complainant. In both instances, the defendant seems to have been a factor—an agent—for the shippers of merchandise. The defendant corporation in these matters was more the agent of the firm than the latter was of the corporation. Whatever

the relations between the two might otherwise be, the agency in March, 1911, of Adams to be served with process in litigation against the defendant in Kentucky can only be imagined. It was not proved.

"We shall insert in the judgment our findings of fact.

"We conclude that the motion to quash the Marshall's return on the subpoena issued on the bill of complaint should be sustained.

"Except to that extent, the plea to the jurisdiction will not now be acted upon.

"WALTER EVANS, Judge.

"May 27, 1911."

~~SIX—BRIEF~~

If the evidence in this case can be considered as anything like evenly balanced, we do not understand that this court would reverse the lower court on the question of fact. Had the direct and positive statements of the president and vice-president of the New York corporation, supported as they are by the testimony of Adams and by contemporaneous writings and entries, been flatly contradicted by direct evidence of witnesses in a position to know the material facts, it would be necessary to determine which of the witnesses are to be believed, and the trial court ought to be in the better position to judge of this.

Where the evidence is conflicting, the Supreme Court will not interfere with the decision of the lower court. *Taylor's Jur. & Proc.* of the U. S. Supreme Court, p. 707.

Could this court have grave doubt upon the questions of fact raised by the record, it would it under the rule laid down in *Alviso vs. United States* 8 Wallace 337, not

feel justified in interfering with the decree of the Circuit Judge.

It was decided in *Hewitt vs. Campbell*, 109 U. S. 103, that when the court below might well have dismissed the bill upon the sole ground that the complainant had failed to establish the facts upon which he based his claim for relief the decree must be affirmed.

Wherefore, it is respectfully submitted that the appeal herein should be dismissed or that the decree of the Circuit Court be affirmed.

JOHN H. CHANDLER,
WILLIAM B. FLEMING,
Attorneys for Appellee.

March 27, 1912.

# HERNDON-CARTER COMPANY *v.* JAMES N. NORRIS, SON & COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

No. 923. Submitted April 1, 1912.—Decided April 29, 1912.

Where jurisdiction of the Circuit Court involves only the questions of fact whether the defendant corporation was doing business within the jurisdiction and the person served was its agent, those questions can be brought by direct appeal to this court under § 5 of the Circuit Court of Appeals Act of 1891.

The decree of dismissal can take the place of a certificate if the record is in such form as to show that the case was dismissed for want of jurisdiction, and for that reason only. *Excelsior Water Power Co.* v. *Pacific Bridge Co.*, 185 U. S. 282.

While the jurisdictional certificate must be issued during the term at which the question is decided, if the certificate is supplied by a decree in due form showing all that is required by the certificate, the appeal may be perfected within two years, as are other appeals. *Excelsior Water Power Co.* v. *Pacific Bridge Co.*, 185 U. S. 282.

In this case the record shows that there was but one final order or decree which at the same time quashed the service of the summons and dismissed the case for want of jurisdiction; and an appeal from such a decree brings to this court the question of jurisdiction.

A foreign corporation in order to be subject to the jurisdiction of a court must be doing business within the State of the court's jurisdiction, and the service must be made there upon some duly authorized officer or agent.

In this case, as it appears from the evidence in the record that the defendant corporation was doing business within the State and that the person served was its agent at the time of service, the Circuit Court had jurisdiction.

THE facts, which involve the jurisdiction of the Circuit Court of the Western District of Kentucky over the person of the defendant by reason of service on defendant's agent and whether defendant was doing business in that District, are stated in the opinion.

*Mr. Helm Bruce* for appellant.

*Mr. John H. Chandler* and *Mr. William B. Fleming* for appellees.

MR. JUSTICE DAY delivered the opinion of the court.

In this case a suit was brought by the Herndon-Carter Company, a corporation of the State of Kentucky, against James N. Norris, Son & Company, a corporation of the State of New York. The bill of complaint sought an accounting and settlement of transactions between the parties growing out of shipments of poultry from the Kentucky corporation to the New York corporation, sold by the latter on commission. A subpœna was issued and served on March 10, 1911, upon James N. Norris, Son & Company by delivering a copy to W. J. Adams, as manager and chief agent, and the highest officer of the company in the district. The defendant company entered a special appearance, and filed an objection and plea to the jurisdiction, setting up that it was a corporation of the State of New York; that since December, 1904, it had not had any place of business in the State of Kentucky, and had not conducted any business in that State; that since that time it had had no agent in the State of Kentucky; and that W. J. Adams was not at the time of the service of the writ the manager and officer or agent of the defendant. The defendant averred further that for a little more than two years before the first of January, 1905, Adams was employed by it and acted as its agent in Kentucky in the purchase and shipment of poultry and produce, but that at the end of the year 1904 he severed his connection with defendant and ceased to be its agent for any purpose whatever; that on January 1, 1905, Adams, James N. Norris and William H. Norris formed a partnership, in which Adams had an one-half interest and James N.

Norris and William H. Norris each an one-quarter interest, and that since the first of January, 1905, the partnership had conducted the business of buyers and shippers of poultry, butter and eggs in Louisville and other parts of Kentucky.

Upon testimony, to be hereinafter referred to, the Circuit Court heard the parties upon the issues made by the plea to the jurisdiction and replication thereto, and concluded that Adams was not the agent at the time of the attempted service upon him as such, and that James N. Norris, Son & Company was not then doing business in the State of Kentucky.

The case is brought directly here under § 5 of the Circuit Court of Appeals Act of March 3, 1891 (26 Stat. 826, c. 517). It is evident from a statement of the question made that it only involves issues of fact as to whether the defendant company was doing business in Kentucky, and whether Adams was its agent at the time of the attempted service. It is well settled that a question of this character may be brought to this court by direct appeal under the Circuit Court of Appeals Act. *Remington* v. *Central Pacific R. R. Co.*, 198 U. S. 95; *Commercial Mutual Accident Co.* v. *Davis*, 213 U. S. 245, 256; *Mechanical Appliance Co.* v. *Castleman*, 215 U. S. 437.

The appellee objects that the statutory requirement that the question of jurisdiction only shall be certified to this court was not complied with, and therefore the case should be dismissed. The record, however, discloses that the case was dismissed for the want of jurisdiction, and for that reason only. Where the decree of dismissal is in such form it is sufficient to take the place of a certificate within the requirements of the act. *Excelsior W. P. Co.* v. *Pacific Bridge Co.*, 185 U. S. 282.

It is further objected that, if the decree could be held to take the place of a certificate, the present appeal was not taken at the term during which the case was decided and

the decree of dismissal entered. The record shows that an appeal was taken to the Circuit Court of Appeals from the decree of dismissal entered at the March term, 1911, of the Circuit Court. It was there dismissed, and at the October term, 1911, another appeal was allowed from the Circuit Court directly to this court. This court has held that the jurisdictional certificate must be issued during the term at which the question is decided. *Colvin* v. *Jacksonville*, 158 U. S. 456; *The Bayonne*, 159 U. S. 687. It has also been held that the certificate being supplied by a decree in due form, showing dismissal for want of jurisdiction only, the appeal may be perfected subsequently, within two years, as are other appeals. *Excelsior W. P. Co.* v. *Pacific Bridge Co.*, *supra*.

The appellee further contends that the record shows two decrees or orders—an order quashing the service of summons and separately a decree of dismissal for want of jurisdiction—and this is said to be shown because the opinion of the court, sent up with the record, states the decision upon the question of quashing service of summons to have been first made. An inspection of the record shows but one final order or decree, which at the same time quashes the service of summons and dismisses the case for want of jurisdiction, and that is the decree appealed from and which brings to this court the question of jurisdiction of the defendant.

It has frequently been held in this court that a foreign corporation, in order to be subject to the jurisdiction of a court, must be doing business within the State of the court's jurisdiction, and service must there be made upon some duly authorized officer or agent. *St. Clair* v. *Cox*, 106 U. S. 350; *Goldey* v. *Morning News*, 156 U. S. 518; *Peterson* v. *Chicago, Rock Island & Pac. Ry.*, 205 U. S. 364. We are therefore brought to review the correctness of the decision of the Circuit Court, holding that James N. Norris, Son & Company was not doing business in the

State of Kentucky, and that Adams was not its agent at the time of the attempted service.

The substance of the plea to the jurisdiction, already indicated, is that, while Adams had previously been the agent of the defendant, he ceased to be such on the first of January, 1905, when the copartnership was formed between James N. Norris and William H. Norris, officers of the defendant company, and Adams, and that thereafter he ceased to represent the corporation in Kentucky, and it ceased to do business in that State. To support this plea the defendant offered the affidavits of James N. Norris and William H. Norris to the effect that after January 1, 1905, the corporation did no business in Kentucky, and that the partnership then formed thereafter carried on the business in that State under the name of James N. Norris, Son & Company. The testimony of the bookkeeper was taken. She testified that she had been in the employ of James N. Norris, Son & Company for some time prior to January 1, 1905, and that at that date a change was made owing to the formation of the partnership. She further testified that the profits were divided on the books but no settlements were made while she was with the firm; that she drew no checks for the distribution of the profits, and that there was no such distribution while she was with the firm, which was until December, 1908; that the books did not show the individual accounts of the various members of the firm; that Mr. Adams had an individual account, but she, the bookkeeper, did not keep it, Mr. Adams keeping it himself; that Mr. Adams was paid a salary, and that statements were sent to New York giving the condition of the business. Mr. Adams was called as a witness and testified that he worked for the New York corporation prior to January 1, 1905, when the partnership was formed, and that since that time he had no connection with the New York company in any way, and was not on the ninth of

March, 1911, its agent. Upon cross-examination he testified that after January 1, 1905, and until the date of his examination as a witness, his relations to the house of James N. Norris, Son & Company had been the same, and that his relations to the New York corporation had not changed in any way since February, 1905.

To meet this testimony the complainant offered testimony tending to show that James N. Norris, Son & Company was sued in the Jefferson Circuit Court of Kentucky as a corporation of the State of New Jersey. The corporation appeared and answered that it was organized under the laws of New York, admitted that it executed and delivered a certain letter attached to plaintiff's petition and marked "Exhibit A," dated June 25, 1907, the letter being written from Louisville, Kentucky, signed James N. Norris, Son & Company, by W. J. Adams, Manager. In that action an affidavit for a continuance was filed on April 17, 1908, in which Adams deposed that the defendant, James N. Norris, Son & Company, was a corporation of New York and that deponent was the manager of its Louisville office. On April 23, 1908, an amended answer was filed, which Adams verified, making oath that he was the local manager of James N. Norris, Son & Company. In the course of the action defendant took and filed a deposition in which the witness testified that he was the manager of James N. Norris, Son & Company at Bryan, Ohio; that in 1907 he lived in Louisville, Kentucky, and that Adams was then the manager of the Louisville district.

In another suit against James N. Norris, Son & Company, Inc., an answer was filed by W. J. Adams on December 12, 1905, and in verifying which Adams made oath that he was then and at the times mentioned in the answer had been the agent of the defendant in Kentucky and had sole charge of its business in Jefferson County.

In an action brought by the corporation in a magis-

trate's court in Kentucky certain dray tickets on a printed form were introduced in evidence, which showed them to be the tickets of James N. Norris, Son & Company, 135 E. Jefferson Street, Louisville, Kentucky, and that J. N. Norris was President; W. H. Norris, Vice-President and Treasurer, and W. J. Adams, Manager, the tickets being dated November 20, 1908, and January 1 and 4, 1909.

Letters were introduced in evidence in which the defendant company referred the plaintiff company to Mr. Adams for a settlement of differences. On July 7, 1909, the defendant company wrote to the plaintiff company as follows:

"The Herndon-Carter Company, Louisville, Ky.

GENTLEMEN: I am just in receipt of your several letters in which you call attention to the unpleasantness you are having with our house in Louisville.

Now, I would like to make myself plain in this matter. As I have always stated to you and every one else, there is never any good in fighting, but, on the contrary, lots of money lost and harm done. Our Mr. Adams, who runs our house in Louisville, has a certain interest in the profits, and it would be pretty hard for me to say that he shouldn't do this or that, which, in his judgment, curtails his profits."

Examining and considering the evidence tending to show that Adams, after the formation of the alleged partnership on January 1, 1905, continued to represent the defendant company in Louisville, we are forced to the conclusion that the decided preponderance of the evidence supports the complainant's contention that Adams was the authorized managing agent of the defendant company in Kentucky and doing business for it in that State.

The learned judge of the Circuit Court reached the contrary conclusion, and his opinion is justly entitled to great weight, but it seems to proceed upon the theory that the testimony did not show the continuance of the

agency down to March 10, 1911, the time of the service of the subpœna. We think the testimony clearly shows that the relation of Adams to the defendant company was the same at that time as it had been when the various transactions, to which we have referred, were taking place in the years 1905 and the following. There could hardly be stronger testimony than the defendant's own letter of July 7, 1909, in which it is distinctly stated that "Mr. Adams, who runs our house in Louisville, has a certain interest in the profits," etc.

Reaching this conclusion, we are constrained to hold that the court below erred in quashing the return to the subpœna and in dismissing the case, and therefore the judgment must be reversed and the case remanded, with directions to overrule the order quashing the return and to set aside the decree denying the jurisdiction of the court.

*Reversed.*